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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 33

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

BENNO BARTELS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 13, 1939.

CERTIORARI GRANTED APRIL 24, 1939.

SUPREME COURT OF THE UNITED STATES

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CAPTION.

BE IT REMEMBERED, That at a regular term of the United States District Court in and for the Western District of Texas, the Honorable Robert J. McMillan, United States District Judge, presiding, and holding its sessions at San Antonio, Texas, which said term began on the 20th day of December, A. D. 1937, and continued to and included the 5th day of April, A. D. 1938, there came on to be heard and determined

> The Motion of John Hancock Mutual Life Insurance Company, a creditor, to set aside adjudication of bankruptcy and to dismiss Debtor's petition for composition and extension,

in

Cause No. 1988 In Bankruptcy,
In the Matter of Benno Bartels, Debtor.

ORDER APPROVING PETITION AS PROPERLY FILED AND REFERRING CASE TO CONCILIATION COMMISSIONER.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION.

In the Matter of Benno Bartels, Debtor.
No. 1988 Bankruptcy,
(In Proceedings for Composition or Extension).

The petition of Benno Bartels, of Guadalupe Coun Texas, filed at San Antonio, Texas, in said District, on t 2nd day of December A. D. 1937, praying that he be a forded an opportunity to effect a composition or extensi... of time to pay his debts under Section 75 of the Bankruptcy Act, as amended, having been heard and duly considered, is hereby approved as properly filed under said Section, a n d

It is ORDERED that said matter be referred to Alvin P. Mueller Esquire, one of the Conciliation Commissioners of this Court, to take such further proceedings therein as are required by said Section; and that the said Benno Bartels shall attend before said Conciliation Commissioner on the 22nd day of December, A. D. 1937, at Seguin, Texas, and thenceforth shall submit to such orders as may be made by said Conciliation Commissioner or by this Court relating to the proceedings under said Section.

The Clerk will enter this order of record at the San Antonio Division of the Court.

Done at San Antonio, Texas, this the 2nd day of December, A. D. 1937.

ROBERT J. McMILLAN
United States District Judge.

ENTERED: Bankruptcy Volume 3, page 487.
Filed: December 2nd, 1937.

REPORT OF CONCILIATION COMMISSIONER.

(Title Omitted).

On this December 21, 1937, at 10 A. M. a meeting was held by the Creditors in the above numbered and styled cause, pursuant to notices thereof duly mailed to the creditors and to the debtor. There were present at said meeting the debtors, BENNO BARTEL, and the following creditors, representing the following amounts of indebtedness:

1. John Hancock Mutual Life Insurance Company of Boston, Massachusetts, who file a claim for their debt secured by a lien upon the home of Petitioner, aggregating with interest and attorney's fees $8,013.43
2. Mrs. Bertha Kraft, who holds a note for $ 900.00
3. Mrs. Louisa Sauer, who holds a note for $ 500.00
4. The creditor, Robert Meyer, who holds a note for $ 700.00

was not present.

A detailed examination was made of the debtor's financial condition and after discussions, the said debtor proposed to sell personal property valued at approximately $250.00 and also sell a lot which he owns situated in San Antonio, Texas, and apply the proceeds thereof to liquidate part of the delinquencies, to the John Hancock Mutual Life Insurance Company. At the same time the debtor proposed to fully pay all delinquencies remaining unpaid to said John Hancock Mutual Life Insurance Company within three (3) years, but the said insurance Company declined to accept such proposition. The debtor made an agreement with Mrs. Kraft and Mrs. Sauer for an extension of their debts but was unable to obtain an agreement with a majority of the creditors in number and amount.

The John Hancock Mutual Life Insurance Company proposed to wait on its unmatured principal, provided all delinquencies were paid. The debtor stated that he was unable to do this. Thereafter the debtor notified the commissioner that he would make application to be adjudged a bankrupt under sub-section S of section 75 of the Fraiser-Lemke Farm Relief Act.

ALVIN P. MUELLER
Conciliation Commissioner, Guadalupe County, Texas.

Filed 10th day of Jan. 1938.

APPLICATION TO BE ADJUDGED A BANKRUPT UNDER SUBSECTION S OF SECTION 75, FARM RELIEF ACT.

(Title Omitted).

In the above numbered and styled cause, comes now BENNO BARTELS and respectfully shows to the Court that heretofore on December 21, 1937, the Conciliation Commissioner for Guadalupe County held a meeting as required by law, at which meeting the following creditors were present:

1. John Hancock Mutual Life Insurance Company of Boston, Massachusetts, who file a claim for their debt secured by a lien upon the home of Petitioner, aggregating with interest and attorney's fees $8,013.43
2. Mrs. Bertha Kraft, who holds a note for ..... $ 900.00
3. Mrs. Louisa Sauer, who holds a note for ..... $ 500.00
4. The creditor, Robert Meyer who holds a note for ..... $ 700.00

was not present.

The above represent all of the creditors and debts aside from $28.20 owing as taxes.

This Petitioner would state that at such meeting, he was able to procure an extension from the creditors, Mrs. Bertha Kraft and Mrs. Louisa Sauer but that he was unable to reach any kind of agreement with the creditor, John Hancock Mutual Life Insurance Company. This Petitioner proposed to dispose of certain of his personal properties and apply same on the debt of the John Hancock Mutual Life Insurance Company, but he was advised that same was insufficient to cover the delinquencies and, hence same was rejected by said insurance Company. In view of the fact that the said insurance company is by far the largest creditor, this petitioner is unable to submit an agreement consented to by a majority of the creditors in number and amount as required by law.

This petitioner would therefore show to the Court that he desires to be adjudged a Bankrupt in pursuance to and under the provisions of sub-section S of Section 75 of the Fraiser-Lemke Farm Relief Act and here now asks that his property be appraised and that his exemption be set aside to him as required by law in order to comply with said sub-section S of Section 75 and that he be permitted to retain possession of his property under the supervision of the Court.

This Petitioner, therefore, files this his amended petition asking that he be adjudged a Bankrupt in pursuance of said law and that this Court enter such orders as he may be justified and entitled to in order to permit this petitioner to take advantage of the privileges given him according to and by virtue of the aforementioned law.

In this connection, Petitioner would show that he did heretofore on December 2, 1937, file his schedules of assets

and liabilities which he here now asks to be made a part of this petition.

BENNO BARTELS Petitioner.-

I, Benno Bartels, the petitioner above mentioned, do hereby make solemn oath that the statements contained herein are true and correct to the best of my knowledge, information and belief.

BENNO BARTELS Petitioner.-

Subscribed and sworn to before me this 4th day of January, A. D. 1938.

ELBERT JANDT

(Seal) Notary Public, Guadalupe County, Texas.-

Filed 10th day of Jan. 1938.

ADJUDICATION ON AMENDED PETITION

(Title Omitted).

This matter coming on to be heard upon the amended petition of Benno Bartels, that he be adjudged a bankrupt, as provided by Section 75, sub-section (s) of the Bankruptcy Act, and the same having been heard and considered, and it appearing to the court that the said request should be granted;

It is ordered that the said Benno Bartels be, and he is hereby, declared and adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, and that further proceedings be had before Alvin P. Mueller, the Conciliation Commissioner for the County of Guadalupe, who shall henceforth act herein as

a referee, as provided by sub-section (s), Section 75 of said Act.

The Clerk will duly enter this order of record at the San Antonio Division of the Court and provide the Conciliation Commissioner with a copy hereof for his information and observance.

Ordered at San Antonio, Texas, this the 10th day of January A. D. 1938.

ROBERT J. McMILLAN
United States District Judge.

ENTERED: Bankruptcy Volume 3, page 499.

Filed: Jan. 10, 1938.

MOTION TO SET ASIDE ORDER OF ADJUDICATION OF BANKRUPTCY AND DISMISS DEBTOR'S PETITION.

(Title Omitted).

TO THE HONORABLE ROBERT J. McMILLAN, UNITED STATES DISTRICT JUDGE:

Now comes John Hancock Mutual Life Insurance Company, a corporation, of Boston, Massachusetts, a creditor of the above named debtor, Benno Bartels, and files this its motion to set aside the order of adjudication of bankruptcy, heretofore made in the above numbered and entitled matter, and to dismiss the debtor's petition in this proceeding, and, as grounds for this motion, respectfully represents to the court:

1. That the debtor, Benno Bartels, was, at the time of the filing of his petition and schedules in this proceeding and still is indebted to John Hancock Mutual Life Insurance Company in the aggregate sum of $8,195.37, representing principal and interest, and attorney's fees calculated up to March 23, 1938; that the consideration for said indebtedness was a loan in the original principal sum of $6,000.00, made to Martin Kroesche on June 24, 1926, the payment of which indebtedness was and is secured by a first and superior deed of trust lien upon 100 acres of land situated in Guadalupe County, Texas, and described in a deed of trust, dated June 24, 1926, recorded in Volume "Z", page 560, Deed of Trust Records of Guadalupe County, Texas; that the debtor, Benno Bartels, long prior to the filing of his petition in this matter, had purchased said tract of 100 acres of land, and, as a part of the consideration for the purchase of said land, he expressly assumed the payment of the indebtedness held by John Hancock Mutual Life Insurance Company.

2. That the interest upon said indebtedness is now delinquent for more than three years, as shown by the following tabulation showing the calculation of the indebtedness up to March 23, 1938, all as more fully shown by the proof of claim filed in this proceeding by John Hancock Mutual Life Insurance Company.

Principal of loan	$6,000.00.
Balance of interest due 1/1/35	$ 45.93.
Interest on Interest to 3/23/38	$ 9.63.
Interest due 1/1/36	$ 390.00.
Interest on Interest	$ 56.27.
Interest due 1/1/37	$ 390.00.

Interest on Interest	$ 30.92.
Accrued Interest	$ 475.59.
	$7,398.34.
Special mortgage advancement	$ 52.00.
	$7,450.34.
Attorney's fees	$ 745.03.
	$8,195.37.

3. That, heretofore, on December 21, 1937, the first meeting of creditors of the petitioning debtor, Benno Bartels, was held before Hon. Alvin P. Mueller, Conciliation Commissioner of Guadalupe County, Texas; and that a stenographic transcript of the proceedings of said first meeting of creditors is on file in this proceeding, and your applicant makes reference to said stenographic transcript in support of this motion.

4. That, on or about January 10, 1938, without any character of notice to your applicant or to other creditors, so far as your applicant is informed, there was made and entered in this proceeding an order adjudicating the said debtor, Benno Bartels, a bankrupt under the provisions of Sub-section (s), of Section 75, of the Bankruptcy Act, as amended; that said order of adjudication was, under all the facts and circumstances, erroneously made, because the debtor, Benno Bartels, under the law and the facts, was not entitled to avail himself of the provisions of said Sub-section (s), and the effect of the granting of said order of adjudication was and is merely to prolong the debtor's proceeding at a great loss and detriment to your applicant, as a creditor.

5. That the petitioning debtor, Benno Bartels, as shown by the record of the proceedings at the first meeting of

creditors, during the past four years, has not properly farmed said 100 acres of land, by reason whereof the rents and revenues therefrom have been insufficient to pay the interest and taxes accumulating over a period of four years.

6. That the petitioning debtor has not presented and can not present, as your petitioner believes, any feasible or acceptable plan for a composition and extension of his debts; and your applicant avers that the debtor's petition in this proceeding was not filed in good faith or with any hope or expectation of working out his debts and paying up his delinquencies but apparently for the sole purpose of hindering and delaying his creditors.

7. That the Honorable Alvin P. Mueller, Conciliation Commissioner of Guadalupe County, Texas, has heretofore filed herein his report of the first meeting of creditors of the debtor; and, as shown by said report, the debtor is wholly unable to offer any acceptable proposal for an extension of his debts.

8. That this court and the Conciliation Commissioner are without jurisdiction in this matter, because the debtor, Benno Bartels, was not, at the time of the filing of this petition for composition and extension, a farmer within the meaning and intent of Section 75 of the Bankruptcy Act as amended.

9. That the fair and reasonable market value of the real estate held by your applicant as security for the indebtedness hereinabove shown is such that there exists no equity therein for the debtor or any of his other creditors; that the value of said real estate is such that your applicant will suffer a substantial loss upon its debt when said real estate is subjected to the payment of said indebtedness; and that, unless the court shall set aside the order adjudicating the debtor a bankrupt and forthwith dismiss the

debtor's petition and all proceedings thereunder, this applicant will suffer great and irreparable loss.

WHEREFORE, your applicant prays that this motion be set down for hearing after due notice, and that, upon such hearing, the court enter an order herein setting aside the order of adjudication in bankruptcy heretofore made in this proceeding, and that the debtor's petition for composition and extention and all proceedings thereunder be dismissed.

HENRY, BICKETT & BICKETT
Attorneys for John Hancock Mutual
Life Insurance Company.

Filed 23rd day of March, 1938.

REPLY OF THE BANKRUPT TO THE MOTION OF JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY TO VACATE THE ORDER OF ADJUDICATION,

(Title Omitted).

TO THE HONORABLE ROBERT J. McMILLAN, UNITED STATES DISTRICT JUDGE:

Comes now the Bankrupt, Benno Bartels, in the above styled and numbered cause, and files this his Reply to the Motion of the creditor John Hancock Mutual Life Insurance Company to set aside the Order of Adjudication of Bankruptcy, and for such reply respectfully represents to the Court:

I.

Your Bankrupt excepts to said creditor's Motion, for the reason that same wholly fails to set forth facts sufficient in law or in equity to entitle it to the relief sought; and of this general demurrer, he prays judgment of the Court.

II.

Further answering, your Bankrupt denies all and singular the allegations contained in said Motion, save and except such allegations as may have been admitted in his Original Petition to be adjudged a bankrupt, or such as may be hereinafter admitted, and demands strict proof thereof.

III.

Further answering, your Bankrupt specially denies that the adjudication in bankruptcy will merely prolong the debtor's proceeding at great loss and detriment to the said named creditor.

IV.

Your Bankrupt denies that he has not properly farmed the 100 acres of land described in said creditor's Motion during the past four years, and would respectfully show in this connection that whereas, it is true that he has not personally farmed said property until this year during the past four years, that he has farmed same through the system known as the half renter system, whereby the said Bankrupt furnished all seeds, materials, machinery and animals for farming said land, and directed and supervised the farming thereof, paying to the Mexicans who actually did the labor one-half of the costs. That he so farmed said property during that time because of ill health, and the fact that the crops were not better than they were is due

partly to the fact that the Bankrupt was himself unable to farm same during said period of time, and likewise due to adverse weather conditions and adverse insect conditions, but that now your Bankrupt has recuperated sufficiently to personally farm said land, and that he is a first class farmer; that he has purchased a tractor and he is personally farming said land with said tractor and has same in excellent shape for this year, with excellent prospects of a good crop thereon.

V.

Your Bankrupt specially denies that he has not presented a feasible plan for a composition and extension of his debts, and in this connection would respectfully show that with his assets, as shown in his Schedule of Assets, and farming the property himself as he is doing and will do, that during the next three years he will be able to pay off all back interest due this petitioning creditor, together with all current interest thereon and charges, and have his loan in a current shape, and will in said three year period be able to refinance said loan and pay off said creditor in full. That the land on which said creditor has a lien unimproved is worth in excess of $7000.00, and that the improvements thereon are worth conservatively $6000.00, making a total value of said property securing said creditor in excess of $13,000.00. That he has a large equity in said property which will be lost to him unless he be given the benefits of Sub-Section (s) of Section 75 of the Bankruptcy Act, and that he has applied for relief under said Sub-section in good faith, with not only every hope of working out his debts and paying up his delinquencies, but with a reasonable expectation thereof.

VI.

Your Bankrupt further specially denies that he is not a farmer under the meaning of Section 75 of the Bankruptcy Act; and in this connection would respectfully show that practically his entire work and life have been devoted to farming, and at the time he filed his petition he was actually engaged in farming the land upon which the moving creditor has a lien.

VII.

Your Bankrupt further specially denies that the petitioning creditor will suffer great and irreparable loss unless the Order of this Court adjudicating the debtor a bankrupt be set aside; and in this connection, would respectfully show that your Bankrupt is diligently farming the security held by said creditor in a good and workmanlike manner. That he will deliver the proceeds of the crops over and above his expenses and equal to or in excess of the landlord's share of such crops, to the payment of the said creditor's debt, and that no tenant whom the creditor might place upon said farm could or would produce greater revenue thereon for said creditor than will this Bankrupt, and that said creditor is fully protected from any damage or loss by reason of said adjudication in bankruptcy.

WHEREFORE, your Bankrupt prays that the Motion of John Hancock Mutual Life Insurance Company to set aside the order of adjudication in bankruptcy heretofore made, and to dismiss the proceedings thereunder, be in all things denied.

D. E. MOSHEIM

Attorneys for Bankrupt.

Filed April 5, 1938.

STENOGRAPHIC REPORT OF A HEARING HAD BEFORE THE HONORABLE ALVIN P. MUELLER, CONCILIATION COMMISSIONER, GUADALUPE COUNTY, TEXAS, December 21, 1937.

(Title Omitted).

At Seguin, Guadalupe County, Texas, in said district, on the 21st day of December, A. D., 1937, at 10:00 o'clock a. m., before the Honorable Alvin P. Miller, Conciliation Commissioner for Guadalupe County, Texas, the above numbered and entitled cause came on for hearing, whereupon the following proceedings were had:

APPEARANCES:

L. M. Bickett, Esquire, appearing for the creditor, John Hancock Mutual Life Insurance Company;

Mr. R. F. Leslie, representative for John Hancock Mutual Life Insurance Company;

Mrs. Bertha Kraft, appearing for herself; and

Mrs. Louisa Sauer, appearing for herself; and

Mr. Benno Bartels, the debtor.

MR. BICKETT: Before we start, Mr. Miller, we will let it be understood that Mr. Persinger is sworn as reporter for these proceedings.

THE COMMISSIONER: All right.

This is the first meeting of the creditors in the conciliation case of Mr. Benno Bartels. I would like to have the record show those who are present.

The creditors mentioned in the petition are John Hancock Mutual Life Insurance Company.

MR. BICKETT: L. M. Bickett is present representing the John Hancock Mutual Life Insurance Company, as is also Mr. R. F. Leslie.

THE COMMISSIONER: Mrs. Bertha Kraft and Mrs. Louisa Sauer are present. Mr. Robert Meyers is not here. Those are the only creditors mentioned. Of course, Mr. Bartels is present.

Mr. Bickett, do you want to ask the applicant any questions or interrogate him?

MR. BICKETT: Yes, sir. I think Mr. Bartels should be sworn in the usual way at this time.

BENNO BARTELS, debtor, being first duly sworn, testified as follows:

EXAMINATION

By Mr. Bickett:

Q Your name is Benno Bartels?

A Yes, sir.

Q Are you represented by an attorney in these debtor proceedings?

A Mr. Miller here.

Q You don't have an attorney aside from the Conciliation Commissioner? I say you don't have an attorney aside from Mr. Miller?

A No.

Q Where are you living at this time, Mr. Bartels?

A What is it?

Q Where are you living at this time?

A I am living on the farm there.

Q On the tract of 100 acres of land in Guadalupe County?

A Yes, sir.

Q You also operate a store, don't you?

A I used to, but not now any more.

Q You don't have a store now?

A No, sir.

Q Where was the store?

A How?

Q Where was the store?

A The store, it was across just opposite from the farm.

Q Suppose you move your chair around this way, Mr. Bartels, and maybe you will hear better. Sit right there then the reporter can hear you. Now, up to a very short time ago you have been running a store?

A In partnership, yes.

Q Who with?

A With Gilbert Kroesch.

Q Give the reporter that name so he will get it.

A Gilbert Kroesch.

MR. LESLIE: Gilbert Kroesch, K-r-o-e-s-c-h.

Q Mr. Bartels, speak out a little bit louder so we can all hear you, and so the reporter can hear you.

You still have an interest with Mr. Kroesch in the store business?

A Well, how do you mean? I don't know. I sold the interest out. I ain't got no more store.

Q Who did you sell to?

A Kneupper.

Q What is his first name?

A Edgar.

MR. LESLIE: When did you sell?

A About two weeks or three weeks ago.

Q (by Mr. Bickett) What did you get for your interest?

A I haven't got it yet, we have got to take stock first.

Q What is the agreed price that you are selling for?

A I can't tell you that just now.

Q You don't know how much money you are going to get for it, what the agreement is?

A Not yet, we have got to take stock first.

Q What is your deal, what is the nature of your sale?

A He said he was going to take the stock and he was going to pay for it.

Q Is he going to pay you one half the value of the stock?

A One half? I don't know; I think he ought to pay a little more.

MR. LESLIE: He means that you just own one half interest. Is Kneupper going to buy out the other man too?

A Sure, we have an interest there.

Q (by Mr. Bickett) Approximately how much are you going to get out of the store business?

A I can't tell.

Q Estimate it. Can't you give me a rough estimate; is it $500.00, $1,000.00, $1,500.00, how much money approximately??

A You mean my part?

Q Yes, sir.

A About $250.00, something like that.

Q You don't think it will be any more than $250.00?

A No, sir.

Q When do you expect to get that money?

A Just as soon as—about the first or a little after the first of January.

Q Within the next week or ten days?

A Yes.

Q Is the store owing any debts?

A No.

Q So that money will come to you clear and free of any claims or debts, will it?

A Yes, sir.

Q What do you propose to do with the money, Mr. Bartels?

A Pay it, pay off the debts what I owe.

Q Apply it on your debts?

A Yes, sir.

Q Would you be willing to apply that to the insurance company's debt on that land?

A Sure.

Q Have you promised to pay any of it to anybody else?

A Not exactly, but I would like to pay everybody a little bit, everybody.

Q You bought that tract of 100 acres from Mr. Kroesch, didn't you?

A Yes, sir.

Q When did you buy it?

A 1925, I think it was, I am not sure.

Q Did you assume the debt on that which was held by the insurance company?

A Yes, sir.

Q The principal of that debt is $6,000.00?

A Yes, sir.

Q Mr. Bartels, there was a balance of about $45.00 interest due, in fact it became due about January 1, 1935, is that about right?

A Yes, about.

Q Then you owe interest which was due January 1, 1936, $390.00, that is January 1, 1936?

A Yes.

Q Then you owe interest due January 1, 1937, $390.00, that is correct?

A Yes.

Q Then there will be interest, $390.00, due January 1, 1938, that is right, isn't it?

A 1938?

Q Yes.

A Yes.

Q That means that you owe more than three years back interest, doesn't it?

A I don't know.

Q You will owe another installment of interest on January 1, 1938?

A If you figure the interest in advance, yes.

MR. LESLIE: It is not in advance; it is at the end of the year.

Q (by Mr. Bickett) It is the end of the year, due in January?

A January?

Q January 1, 1938, or at the end of this year you will owe another installment?

A I will answer yes, but not at the beginning.

Q But the interest is due on January 1, each year, that is the interest for the preceding year?

A Yes, the preceding year's, sure.

Q How much taxes do you owe, Mr. Bartels?

A I don't owe any.

Q Are your taxes all paid up?

A Paid so far.

Q They are not paid for 1937, are they?

A No, not yet.

Q They are paid for 1936?

A I paid all the rest of it, yes, sir.

Q On January 1, you will owe more than three years back interest, won't you?

A If you figure in 1938.

Q I am not counting the year 1938, but for the year 1937 and the accrued interest which comes due January 1, 1938, that is right?

A (No audible response made by the witness.)

MR. LESLIE: It is actually due December 31, payable January 1; in other words, it is payable at the end of the year. They don't charge you interest except at the end of the year.

A You have got 1938 figured in there.

MR. BICKETT: No, I will show you. You owed a balance of $45.93 interest that was due January 1, 1935, that is right?

A Yes, sir.

THE COMMISSIONER: That is for the year 1934, is it not?

MR. BICKETT: For the year 1934.

MR. LESLIE: That is right.

Q (by Mr. Bickett) I am asking you, Mr. Bartels. Just answer so we will get it into the record.

A Yes, sir.

Q On January 1, 1936 you owed $390.00, which was interest for 1935, payable on the first of 1936, that is right, isn't it?

A Yes.

Q On January 1, 1937 you owed another $390.00, which was the installment due at the end of December, 1936, that is right?

A Yes, sir.

Q Now within a few days, January 1, 1938, you will owe interest that has accrued for 1937, $390.00; that is right, isn't it?

A 1937, no.

Q You haven't paid the 1937 interest?

A No, but you have got 1938 figured in there.

Q No, you are wrong about that.

A Maybe so.

Q I want you to answer now. You owe interest that was due January 1, 1937, don't you?

A Yes.

Q Now when January 1, 1938 comes you will owe another installment, won't you?

A Sure, but not for 1938.

Q No, for the year 1937.

MR. LESLIE: The 1938 interest won't be payable until 1939.

Q (by Mr. Bickett) You have never paid interest in advance, have you?

A No, but it is figured in there.

Q You are wrong about that. I will go over it again.

THE COMMISSIONER: Mr. Bickett, pardon me, I suggest instead of saying January 1, that you just describe it by the year for which it is due.

Q (by Mr. Bickett) Going back over it, I think we can make it clearer to you this way. You owed a balance of $45.93 interest for the year 1934, don't you?

A 1935.

Q I am talking about the interest that was not paid on the first of 1935, the interest which accrued during 1934. You owe a balance on that, don't you?

MR. LESLIE: If you will permit me to ask a question of Mr. Bartels?

MR. BICKETT: Go ahead.

Questions by Mr. Leslie:

Q Mr. Bartels, when you took that place over on the first day of January did you pay any interest on the day you took it over?

A No, sir.

Q You did not. Let us take Kroesch. Mr. Kroesch operated the place—you bought the place on January 1, 1935, I don't know what year, but he did not pay any interest when you bought that place?

A They took it right off.

Q No, they didn't take it off; you are wrong.

MR. BICKETT: There is no use arguing with Mr. Bartels. We have filed a claim here which speaks for itself.

Questions by Mr. Bickett:

Q You have never paid interest in advance, have you, for any given year?

A I have never done that, no, sir.

Q You paid it at the end of the year for that particular year?

A Yes, sir, but if you want the interest in advance—

Q No, I am not asking you that. I am asking you a question; you just answer my questions. At the end of 1937 you will owe another installment of interest, won't you?

A Yes, sir.

Q What is the condition of that land with respect to being in cultivation or not during this past crop year?

A How do you mean?

Q What is the condition, is it all in cultivation or not?

A Not all; I have some leased with the government.

Q How much was in cultivation, has actually been cultivated, give us the approximate acreage?

A About 85 acres.

Q 85 acres in cultivation?

A Yes.

Q What kind of crop is planted on that?

A Corn and cotton.

Q How much cotton did you make?

A Five bales, I think.

Q Five bales?

A Yes, sir.

Q How much money did you get for it?

A I don't know exactly; I didn't figure that out.

Q Approximately how much? How did you farm it, on the shares?

A I had it on the halves, but I am going to farm it myself now from now on.

Q I am talking about this past year. You farmed it on the halves?

A Yes, sir.

Q How much did you get out of the cotton?

A Well, about—a little over $100.00 for my part.

Q Your part was a little over $100.00 from the cotton. How much did you get from the corn?

A I haven't sold the corn yet; I have still got the corn.

Q How much corn have you got, how many bushels for your part?

A I don't know exactly.

Q Well, approximately.

A Well, say about 150 bushels.

Q How much is that a bushel?

A About fifty cents, I think.

Q That is about $75.00 worth of corn that you have got for your share?

A Yes, sir.

Q Now, did you get any other moneys or crops from this property for 1937, that is, this year?

A No, sir.

Q That is all you have gotten off it?

A Yes, sir.

Q Did you get any government money?

A Not yet, I have got it coming.

Q Did you have any of it leased for pasturage?

A Yes, sir.

Q How much?

A 11 acres.

Q 11 acres that you got rent money for?

A Yes.

Q How much?

A I don't know.

Q That is leased to the government?

A Yes.

Q You haven't got anything from that yet?

A No.

Q Have you applied any of this money that you got from the cotton on your debts?

A Sure.

Q What debts did you pay with that?

A Martindale Mortgage Company.

Q You paid Martindale Mortgage Company, to apply on the insurance company's debt during 1937, $102.23?

A Yes.

Q That, as I understand it, went on back interest that you owed?

A Yes, sir.

Q After applying that payment at the end of this year, you still owe more than three years interest, you will still owe more than three years interest, won't you, that is correct, isn't it?

A (Witness made no audible response.)

THE COMMISSIONER: Do you know whether that is correct, Mr. Bartels? Mr. Bickett asked you whether

you still owed over three years interest after that $102.00 was applied.

A For 1938?

THE COMMISSIONER: No.

MR. BICKETT: Without the year 1938.

Q (by Mr. Bickett) I will ask you to look at this statement, just study that statement a minute and see if that is correct. (Passing paper to witness.)

A I don't know that I understand that.

Q You don't know whether that is correct or not. I will show you the claim which the insurance company has filed here, and which contains that same tabulation which you were just looking at. It shows the total principal and interest figured up to December 21, 1937, $7,284.94; $7,284.94 principal and interest due December 21, 1937. Is that correct according to your estimate? Just answer the question; state whether or not that is correct according to your estimate?

A (Witness made no verbal response.)

THE COMMISSIONER: Mr. Bartels, do you know whether that is the correct amount that you owe?

A 1937?

THE COMMISSIONER: No, that will be due on the first of January next year.

MR. LESLIE: No, it is figured to December 21.

A 1937?

Q (by Mr. Bickett) Yes, 1937, it does not include 1938, you see. We will put it this way, you don't deny any of these items, do you, the balance of the interest due for 1934, the amount due for the year 1935, the amount due for the year 1936, and at the end of this year there will be another interest installment due?

A It is '36, '37 and '35; that is $45.00.

Q You just don't know what you owe on it, do you?

A Not exactly, I don't understand it.

THE COMMISSIONER: Mr. Bartels, let me see—let me ask you this. Have you been keeping up with the interest that you owed from time to time?

A Yes, sir, but then I didn't figure it out exactly the amounts, that is, I think that includes 1938 there.

THE COMMISSIONER: Well, we don't want to include 1938. Have you any way that you can tell from your records up to what time you owe interest, and how much you owe?

A Well, I can if I look it up, yes.

Q (by Mr. Bickett) Let me show you this tabulation here, which purports to be a statement of payments made by you since you took it over and since the loan became delinquent. Glance at that and see if that is correct, Mr. Bartels. (Passing paper to witness.)

A Yes, that appears to be all right.

Q That appears to be all right?

A I don't understand that.

Q Does this statement appear to you to be correct?

A Yes.

Q I will just ask you to put your initials on this statement, and I will hand it to the reporter so we can identify it. Just initial it with your initials right there (indicating); put your initials on it so as to identify it as the statement that we are talking about. As I understand it, you say that statement appears to be correct, don't you?

A This here, yes (indicating.)

Q All right, I just want you to identify that so we can hand it to the reporter. So we can identify it; just put your initials on it.

THE COMMISSIONER: If it is correct put your initials on it so we will identify it.

(The witness wrote his name "Benno Bartels" on the (paper.

MR. BICKETT: Hand that to the reporter there. Mr. Persinger, put that in evidence.

(Said instrument was received in evidence, marked (Exhibit A, and is hereto appended.

Q (by Mr. Bickett) Now, how do you propose to pay this delinquent interest on this loan?

A Well, I will tell you, by going back and farming it; I have got me a tractor, I think I will go back and farm it. I will give up the store. I am going to work it out.

Q You haven't been farming it yourself before?

A Not exactly, because I couldn't, I was sick all the time. Now I am better and I am going back to the farm. I think I can make it.

Q How many years since you actually farmed it yourself?

A Well, it has been about four years ago when I got hurt, I couldn't work any more, I am all right again now and I am going back and farm.

Q Do you have any hope of being able to pay up this back interest any time soon?

A Yes, sir.

Q Do you have any money or funds on hand that you can pay it with?

A No, sir, not right now.

Q Do you have any way of borrowing any money to pay up the back interest?

A No, I ain't got no money, if I could get it I would pay it.

Q You don't know where you could borrow any?

A Not right now.

Q Have you made any effort to refinance this indebtedness, get it taken up?

A Not exactly. Yes, some, but not exactly.

Q Have you applied to any loan company, any mortgage company or any insurance company for a loan?

A Yes, sir.

Q What happened when you made the application; did they refuse it?

A They refused it, yes, sir.

Q Why did they refuse it?

A They told me to go to Mr. Earnest over there.

Q Mr. Earnest, the representative of the Land Bank?

A Yes.

Q Did you make application to him?

A Yes, sir, and they only allowed me $54.00 an acre.

Q $54.00 an acre for all that land?

A Mr. Leslie wrote me they would settle the debt, but I wouldn't take $54.00.

Q Wouldn't take $54.00?

A No, sir.

Q The highest offer you could get from the Federal Land Bank was $54.00 an acre, that is $5,400.00?

A Yes.

Q The debt is $7,000.00?

A It wasn't at that time.

Q I am talking about this time.

A I didn't make application this time; it was three years ago.

Q You haven't made an application recently?

A No, sir.

Q Have you tried anywhere else to get any money recently, get a loan on the land?

A No, sir; of course, they told me they would make it, but I didn't take it so I didn't try any more.

Q You haven't tried any more?

A No, sir.

Q You don't know of any place where you could get more than $54.00 an acre at this time?

A They offered me $54.00.

Q Do you know of any place where you could get more than $54.00 an acre?

A Well, right now I haven't tried it.

Q What is the condition of the place there with respect to being in Johnson grass, isn't it pretty well covered with Johnson grass?

A Some places, not all.

Q It is pretty well scattered over the 85 acres that are in cultivation?

A It is scattered there, yes, sir.

Q As a matter of fact, it has been poorly farmed by your tenant this year, hasn't it?

A Yes, sir.

Q And last year it was poorly farmed, wasn't it; you did not get enough off of it to do much more than to pay the taxes?

A Well, I got something.

Q In its present condition what do you consider that land is worth an acre, just as it stands now, the reasonable market value of it at this time? We want you to give us your estimate. What is your opinion as to the reasonable market value of the land at this time per acre?

A (Witness made no verbal response.)

THE COMMISSIONER: What do you think it is worth Mr. Bartels?

A You mean if we have to sell it?

MR. BICKETT: Yes, at this time.

THE COMMISSIONER: I don't know whether it would be if you had to sell it.

MR. BICKETT: Not having to sell it, what is the reasonable market value today from some one who is willing to buy from a man who is willing to sell?

A I think it is worth $100.00 an acre.

Q (by Mr. Bickett) You think it is worth $100.00 an acre?

A Yes, sir.

Q You think the whole place is worth $10,000.00, is that your idea of the value?

A You mean the house and the farm?

Q I mean everything as it stands.

THE COMMISSIONER: That would include the house on the 100 acres.

MR. LESLIE: That would include the improvements on the 100 acres.

A That is a different thing, I wouldn't sell it for $100.00.

Q (by Mr. Bickett) I mean with the improvements on it?

A $150.00.

Q You wouldn't sell it for less than $150.00 an acre?

A No, sir.

Q Do you know of any land in that vicinity that has sold for that recently?

A Not recently. I paid more than that, I paid $200.00 an acre for that land.

Q As a matter of fact, you could not get $60.00 an acre for it now, can you? What is the highest price you think you could sell it for now?

A $100.00.

Q You think you can get $100.00 an acre for it?

A Yes.

Q Have you had any offer from anybody to pay $100.-00 an acre for it?

A No, I never did try to sell it.

Q You have not made any effort to sell it?

A No, sir.

Q You don't know what you could get for it, do you?

A I think I can get $100.00.

Q Have you heard of any land in that community selling at $100.00 an acre?

A Well, the place next to me sold for mighty near that.

Q When?

A About three or four days ago.

MR. LESLIE: Why didn't you sell it, Mr. Bartels?

A How?

MR. LESLIE: Why didn't you sell it if you can get $100.00; that would give you an equity of $3,000.00?

A You didn't give me no chance to sell it.

MR. LESLIE: You have had it three years.

Q (by Mr. Bickett) Have you made any efforts to sell it?

A No, I didn't.

Q Do you intend to make an effort to sell that land?

A Sure, as soon as they give me a chance.

Q How much time do you want to try to sell it?

A When I can.

Q Do you have any plan or proposal to submit to your creditors, Mr. Bartels, as a composition or extension of your debts in these proceedings?

A No. I want to pay everybody that I owe, sure.

Q You don't have any definite, concrete plan now, do you?

A No, not exactly, but I want to pay everybody I owe.

Q How are you going to raise the money to farm the land this coming year? Can you tell us how you are going to raise the money to farm it?

A I will just have to get out and make a little.

Q I mean from what source can you raise money, Mr. Bartels; from whom can you get it and where, do you know?

A I don't know what you mean by that just exactly.

Q You have got to have some money this year, don't you, to farm the 100 acres?

A Yes, sir, sure.

Q Have you any money on hand?

A No, sir.

Q Do you know of anybody that you can get it from?

A Not right now, but I believe I can.

Q You believe you can. You haven't gotten anybody to say they would loan you any money?

A No, but I always could get some, a little from the bank.

Q Do you know anybody in the bank that would lend you money to finance this coming crop year?

A I always did. The First National Bank at New Braunfels always did give me money.

Q Did they finance you this past year?

A Yes.

Q Did you give them a crop mortgage?

A No, sir.

Q How much do you owe the bank?

A The crop mortgage I always give to Martindale Mortgage Company.

Q Or the insurance company?

A Yes, sir.

Q How much do you owe the bank?

A Not nothing now.

Q You don't owe the bank anything?

A No; sir.

Q Did you borrow any money from them this past year, during 1937 did you borrow any money from the bank?

A No, not this past year I didn't borrow any money from the bank. You asked if I could get some, and I think I can get it.

Q You haven't tried this year?

A No, sir.

Q Don't you feel like, Mr. Bartels, that it is a hopeless situation for you to be able to get enough money to pay up this back interest?

A No, I don't think so.

Q Well, you can't make it out of this coming year's crops, can you?

A I don't know; I can't tell.

Q In view of your experience if past years, you can't make that much net, can you?

A I always make it when I worked it; the first six or seven years I always did make it.

MR. LESLIE: How much per acre is the normal income from that land per year; what would you say the normal income would be, would it be $10.00, $15.00 per acre after deducting the expenses of making the crop?

A I can't figure that much. About $6.00 an acre, somewhere around there.

Q (by Mr. Leslie) You think the net income would be around $6.00 an acre?

A Yes, sir.

Q In other words, about $600.00 a year?

A Yes.

Questions by Mr. Bickett:

Q Has it averaged that over the past five years or not?

A Not the last five years. Of course, I had it rented out on the halves, but I am going to work it myself from now on.

Q Well, you owe the insurance company more than $1,200.00 interest, don't you?

A Including 1938, yes, sir.

Q I mean without 1938. Mr. Bartels, look at these figures here (exhibiting paper to witness).

A Yes, I know.

Q It will be $1,284.00?

A I don't understand.

Q You don't understand it. You do say that the statement that you initialed is correct?

A Otherwise, but that includes 1938.

Q We disagree about that. The claim speaks for itself; we won't argue about that. Isn't it a fact that the end of this year, it is now figured up to December 21, that you owe $1,284.94? You don't know how much interest you owe, do you? Have you got any books and records which will show how much you owe?

A I have got the checks there. I will have to look them up.

MR. LESLIE: This figure here is not figured to January 1, this figure is to December 21, this year.

Q (by Mr. Bickett) Mr. Bartels, you testified that the statement there is correct as to the payments that were made?

A That includes 1938.

Q Well, I will ask you to look at the statement again. You will see that it does not.

A '36—'35.

Q I will ask you to read that "Interest accruing from January 1, 1937 to December 21, 1937, $375.92." That is the last item of interest shown on the statement, isn't it? Answer it so the reporter will get it. Isn't that the last item of interest shown? Just read this item here, Mr. Bartels.

A Yes.

Q Read it out.

A "'37—"

Q Read it out loud so the reporter can hear you. You can read that line, can't you, Mr. Bartels, this line right here?

A I don't—

Q Read it out so the reporter can hear you; read it out, please, sir?

A "Accrued interest January 1, 1937 to December 31, 1937—"

Q That is "December 21", isn't it?

A "21".

Q What is the amount?

A $375.00.

Q And ninety-two cents?

A Ninety-two cents.

Q That is the last item in the statement, isn't it?

A How come that $375.00?

MR. LESLIE: It is less than a year.

Q. (by Mr. Bickett). You are not just clear as to how much interest you owe, are you, Mr. Bartels?

A Not exactly, no. I know I don't owe that much interest.

Q But the record does show that you bought the property from Mr. Martin Kroesch and got a deed from him—what is the date of that, Mr. Miller?

THE COMMISSIONER: July 17, 1930.

Q July 17, 1930. That is correct, isn't it, if the record shows that is the date of it?

A It must be correct.

Q It must be correct?

A Yes.

Q Then when the interest came due after that you got in default and just paid a part of it, didn't you, January 10, 1931 you paid $200.00, didn't you?

A Well, that is what it says there.

Q That is the first payment you made. Then on August 10, 1931 you paid the balance of $190.00. As a matter of fact, you have been delinquent, behind in your interest payments ever since you bought the property, haven't you?

A No, sir.

Q You always paid up promptly?

A No, sir, not for the last few years.

Q The last few years you have been delinquent?

A Yes, sir.

Q You have been delinquent, behind in your interest payments, for the last six years, haven't you?

A No, I always paid something every year.

Q Always paid something. What you mean, Mr. Bartels, is that you were unable to pay it all when it was due and you paid what you could?

A I paid all I could pay.

Q You paid all you could pay, but you could not pay the installments as they became due?

A Not the past five years.

Q Well, the last six years, since you got the property, look at that statement there. Were you not delayed about eight months in making this payment?

A That year (indicating)?

Q 1931, that is right, isn't it?

A That is the date.

Q Yes, it is the date. I mean you were delayed in making the payment because you were unable to pay it promptly, that is right, isn't it?

A Yes.

Q So as a matter of fact you have been delinquent with your interest payments, that is, behind in keeping up your payments, ever since you took the land over, haven't you?

A I don't understand that. I think—

THE COMMISSIONER: Mr. Bartels, the first year you paid interest was for the year 1930, that interest was due at the end of the year and you were unable to pay that interest, all of it, until August of the following year, 1931, that is correct, isn't it? The 1930 interest that you owed was due January 1, 1931, that is correct, isn't it?

A But I got this land longer than that. When I bought the land I made a loan right away, that must be a mistake in the date somewhere. I can bring the deed down here. That must be a mistake.

Q (by Mr. Bickett) You did not take it over at any time before you got a deed, did you?

A No, I have a deed to that land back in 1925.

Q You last got title to this land by deed from Martin Kroesch in 1930, didn't you?

A I think that is right, yes.

Q And ever since you have had the land this last time, under a deed from Martin Kroesch in 1930, you have been a little bit behind with your interest payments, haven't you?

A I think so, yes, sure; yes.

Q Now, you really don't have any way of raising this back interest and paying it up, do you?

A No.

Q How long do you think it will take you to pay it out of the crops?

A I think I can make it in three years.

MR. LESLIE: Keep the interest paid up?

A Yes, sir.

MR. LESLIE: The back interest, current interest and taxes?

A Yes, sir.

Q (by Mr. Bickett) You say the average income will be about $600.00 a year. Do you realize that out of that you would have to pay current interest as you go along, that is $390.00?

A Yes, if you charged the same interest.

Q You believe that you can pay each year's interest as you go along during the coming three years and make enough to pay all of this back interest?

A Yes, I made it before and I think I can do it again.

Q As a matter of fact, you have never been able, since you got the property in 1930, have you, to pay your interest promptly?

A That is only a half.

Q That is only a what? I didn't understand that.

MR. MILLER: He said, "That is only a half", because he rented it on the halves.

A Because I couldn't work it; I was sick.

Q What equipment besides the tractor have you got to farm with, Mr. Bartels, by way of teams and tools?

A I have got the tractor.

Q I say besides the tractor, what implements, tools and teams have you got?

A I don't understand what you mean.

Q Have you got anything besides the tractor to farm with?

A No, because I want to trade the mules in for the tractor. I got the tractor already but I want to put them in.

Q You haven't got any teams?

A No, not any more.

Q No mules or horses?

A Just got a horse.

Q Just one horse?

A Yes.

Q You haven't got any work stock, have you?

A No.

Q What implements have you got besides the tractor?

A Cultivator, plows and stuff like that.

Q Is that tractor mortgaged?

A No, not yet.

Q You don't owe anything on your tractor?

A Oh, yes, sure.

Q That is what I mean. How much do you owe on your tractor? Just tell us approximately, not down to the exact cents, how much do you owe on your tractor?

A Well, approximately about $500.00.

Q Approximately $500.00 on your tractor. Are your payments up on that, or are you in default in your payments?

A No, they don't come due until next year.

Q You just bought the tractor recently?

A Yes.

Q What was the total price of it?

A $1,100.00.

Q $1,100.00. How did you pay the $600.00; did you pay $600.00 on it?

A I put the mules in.

Q With the mules—teams that you traded in?

A Yes, sir.

Q That leaves you owing a balance of $500.00, secured by a mortgage on the tractor, isn't it?

A Well, they have not taken it yet, I reckon they will.

Q You signed up a note, didn't you?

A Not yet.

Q Who did you buy the tractor from?

A Guenther. I haven't signed any note.

Q Give that name again.

A Guenther.

THE COMMISSIONER: Where are they located?

A In New Braunfels.

THE COMMISSIONER: Are they implement people?

A No, just tractor people.

Q (by Mr. Bickett). They just sell tractors in New Braunfels?

A Yes.

Q You bought it from them and you paid them $600.00 in money?

A No.

Q You traded your teams in for $600.00?

A Yes, sir.

Q Did you give a note for the balance?

A Not yet, he never took a note yet, I think he will do it.

Q You agreed to give a note?

A Yes.

Q Secured by the tractor?

A I reckon they will, I don't know.

Q Did they ask you to give a crop mortgage?

A No, they didn't ask me.

Q Are you going to pay that $500.00 in installments or pay all of the balance at once at the end of the year?

A At the end of the year I agreed—

Q You agreed at the end of this coming crop year to pay it; at the end of 1938 you would owe $500.00, is that right?

A No, sir, half of it.

Q You would owe half of it and half next year?

A Yes, sir.

Q That would be $250.00 that you would owe on your tractor?

A Yes.

Q Plus your interest and taxes. That is what you would owe, that is right, isn't it?

A Yes.

Q What other debts have you, Mr. Bartels, besides the insurance company's mortgage?

A Mrs. Kraft here.

Q What is the amount of Mrs. Kraft's debt?

A I think it is $900.00.

Q $900.00. Is that borrowed money?

A Yes, sir.

Q When did she lend you that money?

A I don't know.

Q Well, about how long ago?

A I don't know exactly.

Q Was it a year ago, two years ago, how long?

A No, about seven or eight years.

Q It is represented by a note?

A Yes, sir, a personal note.

Q Any security?

A No, sir.

Q Does that note bear interest? Have you kept the interest paid up?

A So far.

Q You don't owe any back interest?

A Well, I will owe this year.

Q This year. Was that the original amount of that note?

A No, sir, it was $1,000.00.

Q You have paid $100.00 on the principal?

A Yes, sir.

Q Have you renewed that note lately?

A Yes, sir.

Q When?

A A month ago.

Q About a month ago. She has no security?

A No, sir.

Q What rate of interest does that note bear?

A Six per cent.

Q So that would be $54.00 interest that you owe Mrs. Kraft, is that right, six per cent on $900.00?

A Yes, sir.

Q What other debts have you got?

A Mrs. Sauer, $500.00.

Q Mrs. Sauer?

A Yes.

Q S-a-u-e-r?

A Yes, sir.

Q $500.00 borrowed money, is that right?

A Yes.

Q When did you borrow that money?

A Seven or eight years ago.

Q Seven or eight years ago?

A Yes, sir.

Q Does she have a note?

A Yes, sir.

Q Is the interest paid up on that note?

A Yes.

Q Except for this year?

A Yes.

Q Have you renewed that note lately?

A Last year.

Q Renewed it last year. What rate of interest does it bear?

A Six per cent.

Q How much is that note; did you say $600.00?

A $500.00.

Q So that would be $30.00 a year interest that you owe her, is that right?

A Yes, sir.

Q What other debts do you have?

A I think that is all.

Q You don't owe anybody else?

THE COMMISSIONER: You owe Robert Meyers $700.00.

A Robert Meyers, yes.

Q Is that a note?

A Yes, sir, a personal note.

Q When did you borrow that money?

A That is about four or five years ago, something like that.

Q What rate of interest does that bear?

A Eight per cent.

Q Is the interest paid up on that except for this year?

A Yes, sir.

Q What did you say the amount of that was?

THE COMMISSIONER: $700.00.

Q (by Mr. Bickett) That would be $56.00 you owe on that, wouldn't it?

A Yes.

Q Do you owe anybody else?

A No, sir.

Q Do you owe any accounts, open accounts or bills?

A No, sir, that is all.

Q What other property, Mr. Bartels, do you own besides this 100 acres, what other real estate?

A I don't know exactly, I have got it there somewhere.

Q Do you own a homestead?

A No.

Q You don't own a home?

A I live on the place.

Q You live on the 100 acres?

A Yes, sir.

Q Do you own any other real estate besides this 100 acres?

A Just two lots up there in San Antonio.

Q Two lots in San Antonio?

A Yes.

Q Where are they located?

A Berlin Heights.

Q What heights?

A Berlin Heights.

Q Berlin Heights. What do you think those lots are worth?

A $500.00.

Q The two of them are worth $500.00, $250.00 each?

A Yes, sir.

Q Are they mortgaged or clear?

A No, sir, they are clear.

Q Do you owe anything on them?

A No, sir.

Q When did you buy those?

A I don't know exactly. It was in—

Q Several years ago?

A Yes, longer than that.

Q Are they vacant lots?

A They are vacant lots. I bought them in 1917, I think, somewhere around there, '16 or '17.

Q You don't own any other real estate, do you?

A No, sir.

Q Are the taxes paid on those lots in San Antonio?

A Yes, sir.

Q Are those lots in the city limits; where are they located?

A I sure can't tell you; I don't know whether they are in the city limits or not. They are just opposite, what do you call that school?

Q What street are they on?

A East Commerce Street.

Q Out towards the Seguin Road?

A That big school that is out there.

MR. LESLIE: West Commerce Street, the Lady of the Lake College.

A The Lady of the Lake College.

Q (by Mr. Bickett) That has a lot of Mexican property out there, Mexican houses built on the lots?

A I think so, I have never been out there; I have had them over twenty years.

Q You haven't seen them for some years?

A I never did see them.

Q You haven't had any offer to buy them?

A Yes, several times.

Q How much did they offer you?

A $450.00.

Q $450.00 for the two lots?

A Yes, but I am not willing to sell them.

Q You are not willing to sell them for that?

A No, sir.

Q How much did you pay for them?

A $510.00.

Q For the two of them?

A Yes.

Q Was this offer you had recently?

A No, about a year ago.

Q What are you holding them for; what do you think they are worth?

A $500.00.

Q You wouldn't sell them for less?

A Not unless I have to.

Q You don't own any other property, do you, any other real estate?

A No, sir.

Q Have you got any livestock, cattle?

A Well, just mules, but I traded them in for the tractor.

Q You have got only one horse now?

A One horse.

Q That is all the livestock you have, no cattle, you have no cattle?

A One cow.

Q One cow. Do you have one automobile?

A Yes.

Q What kind of a car is that?

A Chevrolet, 1931.

Q Chevrolet, 1931. You have got household furniture, haven't you, in the house you live in?

A Yes, sir.

Q What kind of a house is that on the 100 acres where you live?

A It is a six room house with bathroom, seven room house.

Q Have you been living there this year, this crop year?

A Yes.

Q You have worked the place on the halves?

A Yes, been working it that way, but I am going to work it myself now.

Q What does your family consist of, how many members in your family?

A My wife and son.

Q How old is your son?

A He is twenty-one now.

Q Has he been working the farm for you this year?

A No, sir, he is going to work it for me next year.

Q This coming year?

A Yes, sir.

Q This year did you have one tenant or several?

A Just one Mexican.

Q One Mexican tenant?

A Yes.

Q And he cultivated about 85 acres?

A He tried to, but he didn't work it.

Q He didn't work it. The same way last year?

A You couldn't tell him nothing.

Q As a matter of fact, he farmed it in a mighty sorry way?

A You know how some renters are, you can't tell them nothing.

Q That was true last year?

A He is gone now.

Q How long was he there?

A He was there four years.

Q And those four years he farmed it in a mighty sorry way, did he?

A Yes, sir.

Q Now, let me ask you again. Do you have any definite proposal to make to your creditors here today as to how you are going to pay up your debts and what your plan is?

A Well, my plan is, I am going to try to work it like I did before because I am going to pay everybody; I want to pay everybody, and I am doing my best to try and pay everybody.

Q Don't you realize that your interest, taxes and all these debts you owe is more than the income from the property?

A Maybe so, but it just depends upon—I am going to try to make it if I have a little chance, you know. When we have no work on the farm I am going to try to make a little money on the outside.

Q What other way have you got to make money, what other business have you?

A No other business right now except on the road, something like that.

Q Doing outside work?

A Yes, sir.

Q You haven't any teams?

A No.

Q You mean you would get a job on the road?

A Yes.

Q Who with, who do you expect to get a job with?

A The county commissioner.

Q Can you farm that land and hold a job on the outside?

A I told you, when I can't farm, when I was through farming, otherwise I was going to work the farm, that is the first thing I am going to work is the farm. The main thing I want is to farm, get it clean again.

Q You mean you haven't got a job in sight, but you hope to get one?

A Yes, sir.

Q You don't have any trade that you work at, do you?

A Not now any more; no, sir, not right now, I am going to try to work it out and I think I can.

Q What does your boy do; is he in business, or does he have a trade that he works at?

A No, right now he is going to work the farm, he has been working in the mill, he can get a job there any time he wants to, but we want to get the farm in shape, that is what I want.

Q Don't you feel, Mr. Bartels, that in view of all this money you owe, it is a hopeless proposition, you can't pay it?

A I don't think so; if we could get half way prices, I don't think so. If we don't get no prices then it is hopeless, that is one thing sure.

Q Don't you feel like the debt against this land, the principal and interest, is about all it is worth at this time?

A No, I don't think that, if it was I wouldn't keep it.

Q Don't you think you could buy as good land as that cheaper now?

A No.

Q What is the condition of the improvements on the place?

A The houses?

Q Yes.

A I think the house is worth more than what I owe.

Q Are the improvements in good repair, have you kept them in good shape?

A Yes.

Q How about the fences?

A Well, the fences, they are not so good, but the improvements, the house and everything, when they come up there to look at it, I told Mr. Leslie that time that I have been improving the house, keeping the improvements, and they are in just as good shape—

MR. LESLIE: Your out house is not, Mr. Bartels.

A How?

MR. LESLIE: Your out house is not in good repair.

Q (by Mr. Bickett) The tenant houses and barns?

A Well, that is the tenant.

Q You spoke of the condition of your health. Are you still in bad health?

A No, sir.

Q Completely recovered?

A Yes, sir.

Q You spoke of getting hurt?

A I have been hurt in the back.

Q How did you get hurt?

A Lifting.

Q Lifting something too heavy for you and strained your back?

A Cotton bales.

Q You strained your back lifting cotton bales?

A Yes, sir.

Q When did that happen?

A Several years ago.

Q You have been laid up since then, have you, and couldn't do any work?

A I have been doing work, but I couldn't do any farm work.

Q You feel like you can do farm work now?

A Yes, sir.

Q You think you will be able to do farm work this year?

A Yes, sir.

Q Is your son and wife in good health?

A Yes, sir.

Q Your son is not married; he lives with you?

A No, sir, he is not married; he lives with us.

Q Do you have any money on hand, cash in the bank?

A No.

Q How have you made your living expenses during this past year, Mr. Bartels, from what source?

A Outside work.

Q Just doing labor work when you could get some work?

A Yes, sir.

Q You and your boy?

A All I made on the farm Mr. Martindale was to take that.

Q That was not enough—

A That is right, the other interest I had to make up my own self.

Q Have you and your son work now; are you working at this time?

A Yes.

Q Who are you working for now, Mr. Bartels?

A I am working on the farm now.

Q I mean have you got a job?

A Not right now, no, sir.

Q How long since you had a job?

A Since I haven't worked in the store, since a few days ago.

Q You have been working in the store?

A Yes, sir.

Q What was your income from the store business?

A Just a living, that is all.

Q Just the groceries and supplies for you and your family?

A Yes, sir.

Q You did not get any extra pay in addition to your groceries?

A No, I worked for the groceries.

Q Who did you say your partner was?

A Gilbert Kroesch.

Q You testified that you are going to get $250.00 for your share of the store, about that, didn't you?

A About that, yes, sir.

Q You and your partner don't own the store building —are you renting the store building?

A The only thing we owned was the store.

Q Where is your store located?

A Clear Springs.

Q In the settlement or village there of Clear Springs?

A Yes.

Q Who owns the land where the store is there?

A The Guaranty State Bank.

Q You have been renting the store building?

A Yes, sir.

MR. BICKETT: I believe that is all the questions I have to ask Mr. Bartels.

EXAMINATION

By The Commissioner:

Q Mr. Bartels, when did you sell your interest in the store; when did you sell your stock of goods?

A He is going to buy—he is going to buy it on the first of January.

Q Oh, he is going to buy it?

A It is not sold, but he says he is going to buy it.

Q Is the store still open and operating?

A It is open yet, yes.

Q He is supposed to take it over on the first of January?

A Yes, sir.

Q And you are going to be paid according to the inventory?

A That is right. He said he is going to take it, that is what he told me.

Q How much is he going to pay on the dollar of the inventory price?

A Well, we didn't make no exact agreement yet; I don't know exactly, I couldn't tell you exactly.

Q Is he going to pay you as much as the stock inventories?

A Well, I reckon I have to give him a little discount on it; I think so, yes, sir.

Q Are you reasonably sure that you are going to get that money from the sale?

A That is what he told me.

Q Who is the man you have sold to?

A Kneupper.

Q Kneupper?

A Yes.

Q Where is his home?

A Comal.

Q Where?

A Comal.

Q Comal Town?

A No, Comal.

MR. LESLIE: Comal, a little store.

Q (by the Commissioner) Have you got your rent paid on the store?

A Not all of it yet.

Q How much is still owing on it?

A I owe between fifty and sixty dollars, somewhere around there.

Q Mr. Bartels, the $900.00 that you owe Mrs. Kraft here, when is that due?

A Well, that note is written on the first, I think it is.

THE COMMISSIONER: Mrs. Kraft, when is your note due?

MRS. KRAFT: I don't know.

A VOICE: It was written October 14.

THE COMMISSIONER: It is due next year?

MRS. KRAFT: Yes.

THE COMMISSIONER: When is this note to Mrs. Sauer due?

A VOICE: It is due on the first.

THE COMMISSIONER: The first of the coming year?

THE VOICE: Yes.

THE COMMISSIONER: Is that note going to be extended?

A I don't know, I haven't talked to her.

A VOICE: It will be extended.

Q (by the Commissioner) When is the note due that you owe Mr. Meyers?

A That is written on the five year plan, I don't know what you call it.

Q When did you give the note?

A I gave the note last year, a new note on five years' time.

THE COMMISSIONER: Mr. Bartels, the only way that I see that you can in any way get by is to apply the money that you get from your store, and to sell those lots that you have up in San Antonio even if you don't get $500.00 for them, and turn that money over to Martindale Mortgage Company and then probably make some kind of a proposition and get them to give you more time on the rest. It looks like you are going to have to do that before you—

MR. BARTELS: I am willing to do it; sure, I am willing to do everything I can.

THE COMMISSIONER: Well, now if you turn in the money that you get from the sale of your store, and turn in those lots in San Antonio, say, for instance, those lots would be worth $400.00 and your interest in the store $200.00, that is $600.00.

If he applied that on this debt do you think that you could work out some method by which you could extend the rest of this debt?

MR. LESLIE: I don't think so. The delinquencies amount to about $1,200.00, the current interest is coming on, then there are taxes. I don't think he could make it. The crops off that land are not going to be sufficient, there will be at least $600.00 more for current operations, that will leave all the delinquencies behind. The only way—the only thing we could recommend would be to bring the

—to pay the current delinquencies and extend it—recommend an extension at a lower rate.

THE COMMISSIONER: Of course, there are no assets with which to pay all those delinquencies and that is out of the question.

MR. LESLIE: Mr. Bartels mentioned a lot of money due him. Is that shown in the schedules?

THE COMMISSIONER: Have you got any store accounts due you?

MR. BARTELS: Yes, they ain't very much, I guess $1,500.00.

MR. BICKETT: How much? $1,500.00; how much did you say, Mr. Bartels?.

Q (by the Commissioner) How much store accounts are owing to you, about?

A Oh, the store accounts? Well, I don't know exactly.

Q (by Mr. Bickett) Well, approximately how much, $100.00, $200.00?

A About $100.00.

Q About $100.00; not over $100.00. Are those bad accounts that you can't collect?

A No, I don't think so.

Q You think they can be collected?

A Yes.

Q You mean all of that $100.00 will be coming to you?

A I think so, yes, sir.

Q Have you sold those accounts to Kneupper; does he take over those accounts?

A I don't think so.

Q Do you know whether he will or not; have you sold him those accounts?

A No.

Q That is not in your deal with him?

A No, sir.

Q (by the Commissioner) The note by Martin Kroesch, that is a personal note?

A That is a personal note.

Q Can you collect anything on it?

A Not at present; I asked him and he said he hasn't got anything right now.

MR. LESLIE: Is he a lawyer in Houston?

A No, not a lawyer, he is working—yes, he studied law—he is working for a wholesale house.

MR. BICKETT: What is the amount of that note?

THE COMMISSIONER: $1,500.00.

Q (by Mr. Bickett) Is that note past due?

A Yes, sir.

Q Is that borrowed money that he got from you?

A Yes, sir.

Q A good many years ago?

A Yes, sir.

Q There is no hope of collecting anything on that?

A Not right now, but the way he talked I think next year, at the end of next year, not the first but by the end of next year—

MR. BICKETT: What other notes have you?

THE COMMISSIONER: Mittendorf, $300.00.

Q (by Mr. Bickett) Can you collect anything on the Mittendorf note?

A The same thing, not right now; I asked him the other day, and he said he was going to try to sell some of his stuff.

MR. LESLIE: Is it a secured note?

A No, it is just—

Q (by Mr. Bickett) Both of those notes are unsecured, they are both unsecured?

A Unsecured, yes.

Q Both are now past due?

A Yes, sir.

Q No interest has been paid on either of them for a long time?

A For quite a while.

Q Several years?

A Several years.

MR. LESLIE: Are the notes barred by limitation?

A No.

MR. LESLIE: Not over four years past due?

A No.

THE COMMISSIONER: Mr. Bartels, have you got any suggestion or proposition to make as to how you could go ahead and pay off this debt, these delinquencies, what disposition you could make of them to satisfy your creditors and get them to give you more time on the balance?

MR. BARTELS: Well, if they give me time I think I can work out all right, because if I get that money in—I am going to try to work my own self, as I say, I think I can work out all right, just so they give me a chance.

MR. LESLIE: The trouble is, Mr. Bartels, you are operating under a $7,000.00 debt and you haven't been able to carry the $6,000.00 debt and the accruals are coming on, you haven't been able to carry it on.

THE COMMISSIONER: Mr. Sauer, do you have any suggestions, that is, your mother or you, you represent your mother, regarding the note that she holds against Mr. Bartels?

MR. SAUER: It is kind of sudden; I don't know, I didn't ask my mother, because she didn't receive any notice, I guess the letter must have been lost or something like that.

THE COMMISSIONER: What is her post office address?

MR. SAUER: New Braunfels.

THE COMMISSIONER: New Braunfels, Route 2?

MR. SAUER: No, city.

THE COMMISSIONER: How is that?

MR. SAUER: She lives in the city of New Braunfels.

THE COMMISSIONER: Well, she should have gotten it anyhow, I addressed it to Route 2.

MR. SAUER: Route 2. She never received no letter like that; I asked her Saturday if she received a letter from here, and she said, no. I can't hardly say what her idea is.

THE COMMISSIONER: Do you know, Mr. Sauer, whether she will be willing to extend this debt that Mr. Bartels owes her?

MR. SAUER: I guess so. I am pretty sure of it.

Questions by Mr. Bickett:

Q Mr. Bartels, I believe you said when you bought the land from Martin Kroesch you assumed the insurance company debt. You understood, didn't you, that made you liable on the note?

A Yes.

Q Now, if you get released from the note so that you would not be liable under the note, be through with the transaction, would you be willing to deed the land over in consideration of the insurance company releasing you from any personal liability on the note?

A I don't understand what you mean.

Q Well, I mean if the insurance company would agree to release you, not hold you liable or responsible on the note that you assumed, would you be willing to deed the land over?

A I don't think so, I think the land is worth a whole lot more.

Q You think there is an equity in the land to you?

A Yes.

MR. LESLIE: Would you be willing to sell the land if you got an offer of $100.00 an acre?

A Yes, sir.

MR. LESLIE: Will you try to sell it at $100.00 an acre?

A Sure, if I can sell it at $100.00 I would sell it so I can pay my debts, that is all I want, I want to pay my debts.

MR. BICKETT: You haven't got any prospects of selling it at this time, have you?

A I never tried, because I never did want to sell it, I always wanted to keep it, that is what I have been working for all my life.

THE COMMISSIONER: Have you got any land plowed there now, Mr. Bartels?

A What is that?

THE COMMISSIONER: Do you have any land plowed?

A Some of it, yes, sir. I didn't start in until late; I didn't know whether I would stay there or not, we are at it now, yes, sir.

Q (by Mr. Bickett) How many acres have you got plowed up to now?

A I don't know exactly, but we just started.

Q Well, how much, five or ten acres?

A Oh, fifteen or twenty.

Q Fifteen or twenty acres plowed?

A If we could get one dry week we will be through. I got a man there who promised to help me, he has got a tractor.

Q You are going to hire a man to run his tractor there?

A No, sir, he is just going to help me; one of my neighbors, he is a good friend, he said he was going to help me.

Q What is your arrangement about that?

A He said he would help.

Q You are going to buy the gasoline?

A I would have to buy the gasoline, sure.

Q He is going to run his tractor, and break the land for you for nothing?

A Yes, sir.

Q Not charge you anything?

A He is going to help me out, that is what he said.

Q (by the Commissioner) Mr. Bartels, you say you do not have any definite proposition to offer them. You are willing, however, to turn any money that you get from your store and to convert those lots into money and apply that on the payment of the Martindale Mortgage Company debt?

A Yes, sir.

Q And then you propose to work out the remainder of your debt to the Martindale Mortgage Company, including the current interest, within the next three years, I believe you stated a while ago, is that correct?

A Yes, sir.

Q Now then, that is your proposition, so far as the Martindale Mortgage Company debt is concerned? Now, do you feel that your other creditors that hold these personal notes against you, that you will be able to satisfy them to wait until you—

A I think so, either that—I don't know if I can make it, but that money that I have got loaned out there, that $1,800.00—

Q You think that you could probably pay them out of the money that you collect from the people that owe you?

A Yes.

Q Now would you also be willing, if you could collect any money that is outstanding now, to apply that on your delinquent debts?

A Yes, sir, sure, I want to pay all I can.

Q All right, is there anything more that you can do here? Is there anything else that you can offer that you know of?

A Not at the present, no, sir. I want to try to do all I can.

THE COMMISSIONER: Under the circumstances I believe it would be useless for him to offer anything more here, or do anything more, because there are no assets out of which to pay it with.

Questions by Mr. Bickett:

Q Mr. Bartels, really the only definite money that you have got in sight is from the sale of your interest in the store, isn't it?

A Right now, yes.

Q You don't know whether you could ever make a sale of this land, do you?

A I haven't tried.

Q You haven't had an offer in some years?

A No, but I think I can if I tried to sell it, I think I can.

Q You feel sure you couldn't collect anything on those notes?

A Not at the present.

Q During this coming year?

A Maybe one of them, but not the other one. Mr. Mittendorf, he promised to pay some, I don't know how much. That is due in April and he told me that he thinks he can pay some of it, not at all of it. Martin Kroesch, I don't think he can pay anything, he said he couldn't the last time I talked to him.

THE COMMISSIONER: Where does he live?

A In Houston.

THE COMMISSIONER: What does he do?

A He works for Radoff Brothers Wholesale Dry Goods.

MR. LESLIE: Is that Mittendorf or Kroesch?

A Kroesch.

MR. LESLIE: Where does Mittendorf live?

A He lives in New Braunfels.

MR. LESLIE: Mr. Bartels, didn't you tell me about a month ago that you had a large amount of store accounts due you, and I suggested to you that you go out and collect them?

A Yes, sir.

MR. LESLIE: And now you say you have only $100.-00?

A I believe you can collect those probably.

MR. LESLIE: I was questioning you about the amount and you told me it was quite a large sum, you indicated it was $1,000.00 or $1,200.00 due you?

A No.

MR. LESLIE: You said it was a lot of money and you could pay us if you could get it.

Questions by Mr. Bickett:

Q What is the total of those accounts, your part of it?

A Like I say, about $100.00.

Q About $100.00, not more than that?

A No, sir.

Q You don't have much hopes of collecting that, do you?

A Well, I think I could collect about half of it anyhow.

Q This note that Martin Kroesch owes you, have you made any suggestions to him that he pay you monthly payments out of his salary, make small payments?

A Yes, I talked to him and he said—

Q He couldn't do anything?

A Yes, not this year.

Q Has he ever paid anything on it, is that the original amount?

A That is the original amount; no, he never did pay.

Q It has been running on for several years?

A Yes, sir.

Q He has not paid any interest?

A No, sir.

THE COMMISSIONER: Well, that is about the only proposal that I can see that can be made; I don't know that there is anything else that can be offered.

Now, of course, he is not making that as his original proposition, he is making that—I have suggested that to him, because he hasn't an attorney, but in view of the circumstances I don't know what other suggestion could be made or what other proposition could be made. I don't believe there is anything else that could be proposed. If he is willing to do that, that is about the only thing that I see that he can do.

Now, as I understand it, that is all the proposal, that is all you can do, that is the only suggestion you have to make, Mr. Bartels?

MR. BARTELS: Yes, sir.

THE COMMISSIONER: Now then, if you gentlemen feel that you should accept it, you, of course, are the ones who will have to be satisfied because you represent the majority amount of the total debts by far.

MR. LESLIE: There is not anything definite in it, Mr. Miller. It is just a suggestion, there is nothing definite there that I can see.

MR. BICKETT: Based on his hopes and expectations.

THE COMMISSIONER: There is nothing that I can see, there is nothing more definite to suggest unless you have some way that you can make it more definite. I don't know of any way to make it more definite. I agree with you that it is not very definite, but I don't know any other way to make it more so.

MR. BICKETT: No, with his limited resources I don't see how you can suggest anything else or propose anything else.

THE COMMISSIONER: If that is not acceptable we will have to—

MR. BICKETT: I think we might let the record show that the John Hancock Mutual Life Insurance Company would decline, does decline that proposal as not being feasible, not being acceptable to it.

THE COMMISSIONER: Now, we will have to so report it to the Court for further action.

MR. BICKETT: Yes, sir.

THE COMMISSIONER: All right, that is about all we can do in this case.

Mr. Sauer, I don't know whether I asked you, but I want to ask whether your mother would be willing to extend this debt of Mr. Bartels'?

MR. SAUER: I am pretty sure she will.

THE COMMISSIONER: Mrs. Kraft, do you feel like extending the debt or renewing the debt?

MRS. KRAFT: I believe we will keep it like it is now.

MR. SAUER: It is extended for one year now.

THE COMMISSIONER: All right, there is nothing definite about this, there is no definite agreement. If Mr. Bartels and the insurance company can't agree on that, the only thing that I can do is to report these things to the Federal Court. I don't know what action will be taken on it, but that is all we can do here today anyhow.

MR. SAUER: All right.

THE COMMISSIONER: Mr. Bartels, that is all you can do here today.

* * * * * * *

(The hearing then at 12:10 o'clock p. m. was (adjourned by the Commissioner.

STATE OF TEXAS)
COUNTY OF BEXAR)

I, H. L. Persinger, Shorthand Reporter, do hereby certify that I attended the hearing before the Honorable Alvin P. Miller, Conciliation Commissioner, Guadalupe County, State of Texas, at Seguin, Texas, cause No. 1988—Bankruptcy, proceedings for composition or extension, in the matter of Benno Bartels, Debtor, on the day and date set out in the foregoing transcript; that at said time I took down in shorthand the proceedings had; that thereafter said shorthand notes were reduced to typewriting under my supervision, and that the foregoing pages 1 to 62, both inclusive, contain a full, true, and correct transcript of the proceedings had.

Witness my hand at San Antonio, Texas, this the 27th day of December, A. D., 1937.

H. L. PERSINGER
Shorthand Reporter.

MARTINDALE MORTGAGE

2002 Alamo National Bank Bldg.
San Antonio, Texas

STATEMENT OF PAYMENTS MADE BY BENNO BARTELS
On Loan No. 65803—KROESCHE

- - - - - -

Since loan became delinquent:

Paid 1-1-1931 interest in two payments:	1-10-1931	$200.00	
	8-10-31	190.00	$390.00
Paid 1-1-1932 interest in 5 payments:	1-15-32	$ 50.00	
	5- 4-32	40.00	
	8-25-32	120.82	
	9- 9-32	135.07	
	9-23-32	44.11	$390.00
Paid 1-1-1933 interest in 3 payments:	8-23-33	$151.76	
	10-6-33	140.00	
	12-1-33	98.24	$390.00
Payments thereafter (not completing any one year's interest in one year: Payments received in 1934—2 totaling			$240.00
Paid in 1935:			
Re-payment 1932, 1933 & 1934 tax advance by the Insurance Co.		$86.85	
On account of delinquent interest		68.07	$154.92
Total paid in 1936			$323.77
Total paid in 1937			$102.23

COPY

Filed 14th day of Jan. 1938.

NARRATIVE STATEMENT OF EVIDENCE.

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NARRATIVE STATEMENT OF EVIDENCE.

(Title Omitted).

BE IT REMEMBERED, that upon the trial of the above numbered and entitled cause, before the Honorable Robert J. McMillan, Judge of said Court, beginning on the 5th day of April, A. D., 1938, and continuing thereafter until completed, the same being regular term days of the Court, the following evidence was adduced and proceedings had:

APPEARANCES:

L. M. Bickett, Esquire, appearing on behalf of the petitioner, John Hancock Mutual Life Insurance Company;

T. E. Mosheim, Esquire, appearing for the bankrupt.

MR. BICKETT: We have no new evidence to offer, but would like to reserve the right to offer witnesses in rebuttal.

CAPTAIN A. SCHLAFLEY, a witness on behalf of the bankrupt, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Mosheim:

My name is Captain A. Schlafley. S-c-h-l-a-f-l-e-y is correct. I am resident county engineer of Guadalupe County for the State Highway Department. As such employee of the State Highway Department, I have surveyed a road between New Braunfels and Seguin. That proposed road passes right in front of Benno Bartels' 100 acres near Clear Springs. A portion of his land is used for the right of way. That road is to be a paved state highway; the

appropriation is already made and the designation has been made by the State Highway Department.

ED BOUNDS, a witness on behalf of the bankrupt, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Mosheim:

My name is Ed Bounds. I live at Seguin, Guadalupe County, Texas. I am a building contractor. As such I make estimates on the cost of buildings and likewise advance money for the construction of them. I contract to construct buildings. I am familiar with the cost of various places, residential buildings and farm buildings, and their values in Guadalupe County.

As to whether or not I have had occasion to view the buildings situated on the 100 acres of land known as Benno Bartels' place near Clear Springs, in Guadalupe County, I have been there. I examined all of the buildings as they are. I made notes of them as I examined the buildings. Using those notes to refresh my memory of what the improvements consisted of on that piece of land at that time, the improvements on the tract of land mentioned consisted of a residence, smoke house, immediately behind the residence a store house, a barn, feed room, considerable fencing, chicken houses, pig pens, and two rent houses.

The main dwelling house is 32 by 48. I estimated the value of that house, taking into consideration all of the materials that went into it, and the cost of labor, and allowing for depreciation. To rebuild it at the present time the dwelling house would cost approximately $4,100.00. I wouldn't allow over $250.00 for depreciation. The amount which it would take to put the house back into the shape it

was before, at the time it was built, would be about $3,800.00 to do the work. That is taking into consideration the depreciation on the house, which is in pretty fair shape.

I don't have my notes here on the size of the barn. I estimated it would cost $1,300.00 to rebuild the barn. I wouldn't allow a depreciation of over $150.00 on the barn. The barn is made of principally rough lumber, it has a flooring in there. The outside sheathing is all corrugated iron and the roof. It is not a cheap barn.

I have down here next the smoke house at $160.00. I am doubtful if I can reproduce it for that, $160.00, that is what it is worth now.

I have got an allowance here for $235.00 for fencing. I estimated the number of running feet of fence at so much a foot. The fence amounts to $235.00.

The two rent houses are in different stages of repair. The value will be $600.00 for the two rent houses. That is taking into consideration their present state, their present value, you couldn't rebuild them for that I don't believe, the two of them.

I have got down here some odds and ends, chicken houses, pig pens. I place a value of $90.00 on them.

To rebuild all of those present improvements it would run approximately $6,485.00, and allowing the depreciation that I have, $485.00, to get a good job I would say the value would be $6,000.00, that would be a conservative estimate of what it is worth now. That does not take into consideration the pumping plant and water system, I don't sell pumps, I don't know anything about pumps. I couldn't qualify on that. I haven't taken that into consideration.

CROSS EXAMINATION

By Mr. Bickett:

As to how old those improvements are there, of course, that would be my opinion, and anybody can make a mistake. I would say that they have been there nine years or ten years.

I think the depreciation on the tenant houses, the smoke house and barn is only about $485.00, yes, sir.

* * * * * * *

SILVER WHITSETT, a witness on behalf of the bankrupt, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Mosheim:

My name is Silver Whitsett. I am county agricultural agent for Guadalupe County. I am a graduate of A. & M. College of Texas. I graduated in 1924. Since that time I have been connected with the extension service organization college work for farmers, farm work, working in the counties with farmers doing farm work.

We pay very little attention to the scientic classification of the soil other than the larger group classification in counties. We do make surveys as to that. Yes, sir, I am acquainted with bad soil and good soil, I have studied those.

I have had occasion to go out and view the 100 acres of land near Clear Springs, in Guadalupe County, known as the Benno Bartels place. That soil is known in Guadalupe County as exceptional black land that comes down into that part of the county, that is a black loam. It is the most fertile soil we have in Guadalupe County.

I would say that Mr. Bartels' farm is a good average as compared with its class in its group of black land farms that we have in that county. It is fertile.

As to whether I noticed when I went up there the condition of that farm, whether it is being operated in a farm like manner, or whether it is neglected, I may answer that in this way. We have a farm program in Guadalupe County where the farmer is taught to make a cash crop out of his cotton crop, raising feed, livestock and poultry to back it up. That is what I found on Benno Bartels' farm, I know he is operating under that program. He has plowed his land, he uses a tractor. He was planting corn the day we were there; at that time he had not planted his cotton; I don't know at this time whether he has planted it or not. I was out there about ten days ago.

This year the farmers in Guadalupe County, operating under our program, are about ready to begin planting cotton in Guadalupe County. Mr. Bartels' land is in condition to begin planting cotton.

Mr. Bartels has about 120 barred rock hens, which is a pretty good number on any farm; he has probably 150 to 200 baby chicks coming along as replacements in that flock. I found that he had a brood sow and three other hogs in the pen, prospective meat hogs. I also found that he had a couple of milk cows, not the best bred cows in the county, but good cows for producing milk there for home use.

In his orchard he has principally peaches and plums. He has a few pecan trees, not many.

From my experience with farmers, I consider that Mr. Bartels is carrying on an average farm like we advocate for the county, that the Agricultural Extension Department of A. & M. College advocates.

CROSS EXAMINATION

By Mr. Bickett:

As to the infestation of that land with Johnson grass, Bermuda grass and cockleburs, at that time, I would call it a slight infestation. Probably if you would throw it all together, the way it looked at that particular time, I wouldn't estimate over five or ten acres solid. Yes, I saw it after it had been plowed out and I have seen it previous to that time. Yes, there is a creek or draw that runs through the land. As to how much acreage that takes up, that would be just a rough estimate, I would say probably twenty-five acres. That land can be cultivated, however, it has seed infestation, it is subject to overflow. A part of it is in cultivation now, but not right down close at the average overflow area.

As to what that farm ought to produce annually in its present condition, it is rather hard to make an estimate on that particular farm. I can give you average for the particular communities of which that farm is a type. A man working that farm should make somewhere in the neighborhood of $100.00 a month. That depends on the breaks the man gets there. As to whether or not that return is inadequate, under some conditions it would not be adequate.

WILLIE WEISS, a witness on behalf of the bankrupt, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Mosheim:

My name is Willie Weiss. I live in Seguin, Texas. My business is pictures, photographic studio.

Yes, sir, at the request of some one I did go out to a

farm of 100 acres, known as Benno Bartels' place, near Clear Springs, and take some pictures. I have those pictures here with me. These are the original pictures.

This one represents mainly the water system or water tank, looking at it from the Seguin highway. (Exhibit A) That is on Benno Bartels' place.

This picture represents Benno Bartels' house, his dwelling, looking at it from the same position as the previous picture. (Exhibit B)

This is a picture of Mr. Bartels sitting on his tractor while he was plowing the land when we got there. He was plowing when we got there and we had to wait for him to get across the field. (Exhibit C)

This is the barn, looking at it from the back part of his house. (Exhibit D)

This is one side of the field, if I remember correctly that is the south side of the road which runs through his property, that divides his property. (Exhibit E)

This is the barn from the northwest side, I would say. (Exhibit F)

This is the field on the other side of the road, the left hand side. (Exhibit G)

This is the road that divides his property, looking you might say from the New Braunfels road to the northeast. (Exhibit H). If I remember right, that road leads to Freihert, F-r-e-i-h-e-r-t.

I took those pictures, if I remember right, on March 25, one Friday afternoon between 2:00 and 3:00 o'clock. No, I had not notified Mr. Bartels that I was coming out there, that I know of, to take those pictures. I did not notify Mr. Bartels.

(The bankrupt then offered in evidence the photographs (heretofore identified, same being marked Exhibits A (to H, both inclusive.

(The Court then at 12:00 o'clock m. recessed until 1:20 o'clock p. m., whereupon the following proceedings were had:)

GUS BECKER, a witness on behalf of the bankrupt, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Mosheim:

My name is Gus Becker. I live at New Braunfels, Texas. My occupation is real estate business. I have been engaged in the real estate business since 1930, continuously. During the course of that time I think I have become familiar with the values of real estate in that part of Guadalupe County, Texas, which is contiguous to Comal County. New Braunfels is in Comal County, the two counties adjoin each other near Clear Springs.

Yes, I know the value of land around Clear Springs. I know of a certain 100 acres of land belonging to one Benno Bartels, near Clear Springs. The value of that land without improvements, the cultivated land, not taking into consideration the improvements, is around $70.00 per acre, that is, excluding the houses and barn.

CROSS EXAMINATION

By Mr. Bickett:

Yes, sir, I know of that place. I mean by that, that I drive by there ever once in a while. I didn't walk over it,

but I passed by it going to Seguin and also going the other way.

I don't know exactly how much of that land is in a creek or draw, on the left hand side that thirty-three acres is just a narrow place, you know, but in the lower end it spreads out. I doubt if it is as much as fifteen acres in the creek or draw, I hardly think it is that much, it might be between around ten and fifteen acres, I don't know for sure, something like twelve acres, I guess.

Yes, sir, I know of sales being made in that immediate vicinity for around $70.00 per acre within the last two or three years, the one right next to it, adjoining it, was sold at $75.00 per acre. The improvements on that land were mighty poor improvements. That sale was last fall, I think, last year, it was sold to Mr. Timmerman. It belonged to some loan company; Mr. Timmerman bought it, that is what I heard, that it sold for $75.00 an acre, that is what I was told.

No, sir, it is not a fact that I have some land of the same kind and quality as Bartels' land across the river that I am offering to sell for around twenty or twenty-five dollars an acre. I don't have any land in that vicinity listed with me exclusively, no, sir. I have a place this side, I think it is a little less than 84 acres, belonging to Mr. Rea, Adolph Rea, I was offered $8,000.00 last year some time for that, in fact he wanted $12,000.00, but he come down to $10,000.00. No, I don't know that it is a fact that there are several tracts of land in that vicinity that have sold at $40.00 an acre within the past two or three years, not that I know of.

REDIRECT EXAMINATION

By Mr. Mosheim:

The land that was sold to Mr. Timmeram, that adjoins Mr. Bartels' place. Mr. Bartels' place is a better piece of land than the land bought by Mr. Timmerman, it is better soil; based upon my experience as a real estate man, I think that is the better soil on Mr. Bartels' place.

RECROSS EXAMINATION

By Mr. Bickett:

I don't know exactly that this Timmerman tract had a $7,500.00 lien on it, and it was sold for less than that by the loan company or insurance company. I was told by some people that ought to know that it sold for $75.00 an acre. I did not make the deal; I would not say, I don't know for sure.

REDIRECT EXAMINATION

By Mr. Mosheim:

Yes, sir, I have sold land to Mr. Timmerman. He is a shrewd buyer, he doesn't buy unless it is a bargain. What I mean is he wants it at his price.

HUGH DONNEGAN, a witness on behalf of the bankrupt, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Mosheim:

My name is Hugh Donnegan. I live in Seguin, Texas. My occupaion is insurance agent. I have been in the insurance business a little over twenty-six years. As an in-

surance man I have had experience in valuing buildings. I have had about twenty-six and a half years experience in valuing buildings.

When a person is taking out fire insurance it it my duty to go out and appraise the building on which the insurance is to be taken out. I have been doing that consistently, yes, sir.

Some of the companies I represent at this time are the Home of New York, United States Fire of New York, Republic Underwriters, Trinity-Universal, I have represented some of them over twenty-five years.

Yes, I have had occasion to appraise the dwelling house and barn situated on Mr. Benno Bartels' farm near Clear Springs.

Mr. Bartels' place is about seven miles, six and a half or seven miles from New Braunfels. It is right at Clear Springs. Clear Springs is a country town or community center. They have got a cotton gin, a store building and blacksmith shop. It is a little community with various business houses and they have a bunch of camp houses down there, too.

The present value of the main dwelling house I estimate at $3,700.00 and the barn at $1,250.00, that would be about $4,950.00 for the two.

My appraisals are always checked by a special agent or field man, he checks up everything I write.

No, sir, I do not mean that I wrote $4,950.00 worth of insurance on Mr. Bartels' property, we don't write insurance for the full value, not often.

ALBERT VOGEL, a witness on behalf of the bankrupt, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Mosheim:

My name is Albert Vogel. I live at New Braunfels, Texas. I am in the real estate and livestock business. I have been engaged in the real estate business pretty nearly all my life, a little bit in the real estate business and then in the livestock business; sometimes I quit them and then I start again.

I am sixty-five years old.

As a trader in real estate I think I have become acquainted with the values of real estate in and about Clear Springs, Guadalupe County, Texas. Yes, I have bought land around there, years ago I bought some land there, not far from there. Yes, I have had occasion to see land that other people have bought and sold out there and know the prices paid for it. I know the value of land in that section of the country.

Yes, I am acquainted with the 100 acres of land belonging to Mr. Benno Bartels at Clear Springs. I think the value of that land, not taking into consideration the improvements but the value of the cultivated land, is about $75.00 an acre. Yes, I have heard of some recent sales near there; I heard that Mr. Timmerman bought some there for $75.00 an acre. I think the land that Mr. Timmerman bought adjoins Mr. Bartels' land, I don't know that really, I wouldn't swear to it.

CROSS EXAMINATION

By Mr. Bickett:

Yes, sir, I have been on the Bartels farm and inspected it a lot of times. I go by there all the time. I have been out there, because I wanted it once for sale, I wanted to have it listed and they wouldn't list it with me.

I wish I knew where I could buy land out in that vicinity for $35.00 or $40.00 an acre, I would buy some. I don't know of any for sale at that price. No, sir, Mr. Timmerman did not trade another piece of land for this tract that he bought. No, sir, I don't know of my own personal knowledge what the terms of the sale were, the only thing what I know is I priced Mr. Schleyer's place, I had a buyer for that, that is not far off from there, and he backed out at the last minute when I had it sold. He wanted $100.00 an acre. I didn't make that sale because he wanted more money, he backed out.

As to when is the last time I sold a farm in Guadalupe County, I haven't sold any around there, I sold some for Mr. Martindale, some private people, about six or seven months ago, six months ago. That wasn't in that neighborhood, that was on Highway No. 2. It was not the same kind of land, that is clay and hilly.

No, I don't have any personal knowledge of the Timmerman sale.

REDIRECT EXAMINATION

By Mr. Mosheim:

I had a buyer for Mr. Schleyer's place. Schleyer had thirty acres and he wanted $3,100.00 for it. The buyer I had found for the land was willing to give him that money, but when I got down there he asked $3,500.00. I didn't have that listed, he just told me to find a buyer. Mr. Schleyer's place is not very far from Mr. Bartels' place, I believe there is one place between.

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AUGUST BERNHARDT, a witness on behalf of the bankrupt, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Mosheim:

My name is August Bernhardt. I live at Clear Springs in Guadalupe County. My house and Mr. Bartels' house are about one-eighth of a mile apart; my place adjoins his place.

My occupation is farmer. I have been a farmer since I was fifteen years old, that is twenty-three years.

Yes, sir, I know Mr. Bartels, my neighbor there, I have known him about twenty-five years. His occupation is farmer. Every since I have known him he has been a farmer. His occupation now is farmer. He is farming there on his place at Clear Springs, on his place there next to mine. I see his place every day.

Yes, I know when a place is being worked in a farm like manner. I have had enough experience as a farmer to know whether a place is being properly handled. From my twenty-three years' experience as a farmer I would say that Mr. Bartels is working his farm in a farm like manner.

Yes, sir, he has fruit trees on that place; he has peach trees; I have seen the peaches that are grown on those trees. Those trees bear nice large peaches, most of them, a few are small ones. I have bought some of those peaches.

Yes, sir, he has pecan trees on the place, I couldn't tell you how many. I have seen the pecans that were raised on that place. Those are grafted pecans, soft shell pecans, large soft shell pecans.

Yes, sir, there is electricity at Mr. Bartels' place, right up to the house. He has running water there.

Do I know anything about the value of land out there, am I capable of making a statement as to the value of that land, well, just what I hear what others are paying for it around there. Yes, sir, I have heard what others are paying for land around there. From that information and from being a farmer myself, I would say the value of that land, without the improvements, is $75.00 per acre.

Yes, I know the place that Mr. Timmerman is alleged to have bought. That adjoins Mr. Bartels' place. Mr. Bartels' land is the better land, it is newer land. I heard that Mr. Timmerman paid $75.00, $7,500.00 for that place; it has about 106 acres in it.

CROSS EXAMINATION

By Mr. Bickett:

No, I have no personal knowledge of the Timmerman sale, just what I heard from other people.

The Bartels farm, if properly cultivated, during an average crop year, for the whole place, ought to produce about $1,200.00. No, sir, I would not say it was properly farmed if that place produced only from two or five hundred dollars over the past four or five years.

REDIRECT EXAMINATION

By Mr. Mosheim:

Taking the average of years, taking the good years and bad years and throwing them together, that land ought to produce on an average of a quarter to one-third of a bale of cotton, that would be the average for a number of years.

On the same basis, taking the good years and bad years and throwing them together, the average yield per acre in corn ought to be thirty bushels per acre.

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D. D. BAKER, a witness on behalf of the bankrupt, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Mosheim:

My name is D. D. Baker. I live in Seguin, Texas.

In addition to being the manager and perhaps one of the largest stockholders in the Cotton Oil Mill there at Seguin, I have sold land, bought land, and loaned money.

I have been selling land ever since I was twenty-one years old. I am sixty-one years old now. I have been lending money secured by real estate almost the same length of time. I have loaned considerably more money since 1902.

As to knowing of my own knowledge about the sale of some land to Mr. Timmerman, some land which he purchased next to Mr. Bartels' place, it is common repute that the property has been sold, and that it was sold for $7,500.-00. The deed is on record, I think. No, I have not examined that deed.

Yes, sir, I have made a thorough investigation of this particular case of Mr. Bartels'. I have made the investigation as a member of the Farm Adjustment Board of Guadalupe County.

With respect to the productivity of Mr. Bartels' farm, I understand from Mr. Bartels that on an average the land produced from thirty to thirty-five bushels of corn per acre and about a quarter to a third of a bale of cotton per acre.

In addition to my other activities I have occasion to know the future market on corn, to keep up with the future markets on corn, I keep a record of that and watch the quotations daily. As to the future quotations on corn as of the time that our crops down there usually come in, dur-

ing September, corn closed yesterday, September corn closed yesterday at about sixty-two cents.

The differential in Guadalupe County for corn bought and sold in the future markets there and other future markets is about twelve cents per bushel. That would make the probable future price of corn in Guadalupe County fifty cents a bushel.

No, sir, I am not as familiar with cotton futures as I am with corn futures. I am not qualified to make the same estimate as to cotton that I have made with corn.

I have seen this farm twice recently. I saw it previous to the other hearing, I believe it was February 8, and I have seen it once since then. The state of cultivation of that farm appears good to me. I understand from Mr. Bartels that he had plowed some of it twice when I saw it and other parts as many as three times with a tractor. The land seemed to be well cultivated.

CROSS EXAMINATION

By Mr. Bickett:

Yes, sir, I loan considerable money on farm lands. No, I don't know of any individual or any loan company or insurance company that would lend the amount of principal and interest which Mr. Bartels now owes on this particular farm, amounting to about $7,400.00. If I had that money available I would have loaned it to him. I offered to lend $9,000.00 on that piece of land that was sold to Timmerman, I think it was in 1936, it was just before the Dallas Land Bank took it away from them. Mr. Bartels was offered a loan of $5,200.00 on that property from the Federal Land Bank at Houston, that is what they offered to lend him.

REDIRECT EXAMINATION

By Mr. Mosheim:

That is correct, sir, the reason I did not make Mr. Bartels the loan was that I did not have the money available at the time. I don't think there is any question but that there is a probability that he will be able to get some loan, somebody to lend him enough money to take up the amount of indebtedness against the land, assuming it is around $7,400.00. I would obligate myself to let him have the money if I had it available, I would loan him $7,400.00 on it.

I don't have any loans that will become due in the near future, no, sir. Not in the next few months. I held $9,000.00 three weeks to take up that other loan that I spoke about. I held that money three weeks, and Mr. Kresche decided he would rather let it go. I held that $9,000.00 for him twenty-one days. I am quite sure that place could be refinanced within twelve months.

Some of the money I am talking about is mine, and then I have loaned approximately $50,000.00 for my brother at Memphis, Tennessee, that he turned over to me, I loan money continuously for him, I handle the Baker estate.

RECROSS EXAMINATION

By Mr. Bickett:

As to whether or not I know of any source at this time where Mr. Bartels could borrow more than the Federal Land Bank of Houston offered to loan him, that is, $5,200.00, well, I can answer that question this way. I understand that the people who hold this note were willing to sell it for less than $7,400.00. I asked Mr. Bozarth to get that in writing where they said they would take approximately $6,200.00 for the place. I am talking about the Bartels

place now. I knew that I could refinance it immediately for $5,200.00. I took it up with Mr. Bartels. We knew that between us we could go to the bank and get another thousand dollars for one year, which would fix it, and I figured that within twelve months his crop would come in and he would pay the $1,000.00 back to the bank. I would have been willing to go to the bank and sign a note with him for $1,000.00 to save his place. Had the insurance company not intimated that they were willing to sell the place for $6,200.00 for its debt of $7,400.00 I would not have known of it. No, sir, I don't know anybody at this time who would buy Mr. Bartels' farm for the amount of the debt against it, not today.

BENNO BARTELS, a witness in his own behalf, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Mosheim:

My name is Benno Bartels. I am the bankrupt in this case.

Since the previous hearing I have plowed the land twice, planted corn, sorghum, hegari, and have got it in good shape now.

The corn is up. I have got a good stand of corn.

Yes, sir, I am going into Federal reduction plan, the crop reduction plan. I am allowed thirty-five acres of cotton; corn thirty-five acres; that leaves me approximately thirty acres then that will not be put in to soil depleting crops. My plan under this Federal crop reduction plan is to build up that thirty acres with soil repleting crops by planting beans and stuff like that. The part that I am

leaving out and building up, that is the part near the creek there. I don't know exactly what the Government will allow me for planting that thirty acres in soil repleting crops, they have not announced that yet. Yes, sir, I will receive some pay for that.

Yes, sir, at one time I tried to get a loan from the Federal Land Bank. Yes, I have seen that before, that came to me through the United States mail, that is addressed to me, Mr. Benno Bartels, Route 3, that is my address. Mr. Leslie purportedly signed that. Yes, I have had other letters with that signature on it, that is the way all of them were signed.

(The bankrupt then offered in evidence the following (letter, same being marked Exhibit T, as follows:

San Antonio, Texas
March 22, 1934

Application No. 155917-J

No. 3477 Martin Kroesche
P/O Benno Bartels

Mr. Benno Bartels,
Route 3,
New Braunfels, Texas.
Dear Sir:

We have received advice from Mr. H. A. Ernst that your Federal loan has been approved for $2800.00 by the Land Bank and $2300.00 by the Commissioner aggregating $5100.00. You owe us $6,000.00 principal and $390.00 interest. We cannot conceive of anyone valuing your 100 acres at only $56.00 per acre which is reflected by the Federal Land Bank approval of $2800.00 as they are instructed to loan fifty percent of the value.

We do not believe that you could find anyone familiar with this land that would make a sworn statement that it

is not worth more than that. We believe that sale of this land today under present conditions and having in mind the present price of cotton would bring not less than eight or nine thousand dollars as the buildings are exceptionally good, the land is very desirable and the location excellent. There is a hard surface road and it is adjacent to a gin. We think you should appeal to Mr. Ernst whom you will find very ready and willing to assist you in demanding an increase of this loan and another inspection.

If the Federal Land Bank is to make appraisements as reflected in this application we do not think they will be functioning very long. We think it would be advisable for you to make an appeal to some one who will see that you receive an appraisement in line with the value of your property as we cannot accept the adjustment offered.

Yours truly,

R. F. Leslie

RFL:1h Vice President.

Since I filed my schedules in bankruptcy when I was in your office the other day, I have remembered a piece of property that I did not put down, that property consists mostly of gravel, a little gravel pit; it is a little gravel pit of about two and a half acres. I just forgot to include that in my schedules when I made out the original schedules in bankruptcy. As to whether or not that has any value, it has a lot of gravel on it; they are buying gravel out there now; they are paying about ten cents for gravel, ten cents a load at the pit. No, I don't know approximately the yards of gravel there is in that place.

MR. MOSHEIM: At this time, in view of that evidence, we would like to ask leave to amend our schedules and include that piece of property, the value of which we will

prove up as we go along, it just came to light after I had questioned Mr. Bartels more carefully.

THE COURT: Unless there is some objection, you will be allowed to amend the schedules. (No objection interposed.)

Yes; sir, I have scheduled a note owing by Mr. Kresche, Mr. Martin Kresche, that note is for $1,500.00. I know Mr. Kresche personally. I know the value of that note, that note is worth $1,500.00. The interest on that note has been paid up to the last interest due date. During the time that I have owned that note Mr. Kresche has never failed to pay me the interest, he has always paid it promptly.

I have listed in my schedules another note owing by Louis Mittendorf. Mr. Mittendorf lives in New Braunfels. That note is in the sum of $340.00; I know the value of it, it is worth $340.00. The interest has been paid on that note promptly each year, there is no back interest due on it at this time. I have known Mr. Mittendorf for a long time. Yes, sir, Mr. Mittendorf pays his debts.

CROSS EXAMINATION

By Mr. Bickett:

I let Mr. Kresche have that money in 1927, the note became payable after five years, it became due in 1932. He has not paid any part of the principal.

The other note, it is a new note, Mr. Mittendorf's note, it has not matured yet. That is the $340.00 note. No, sir, I have not made any effort to sell those notes. I don't know anybody who would buy those notes right now.

Yes, sir, I understand that the $1,500.00 note is barred by limitation.

REDIRECT EXAMINATION

By Mr. Mosheim:

Yes, I received a letter from Mr. Martin Kresche regarding that $1,500.00 note, which letter was signed by him and in which he acknowledged that he owed the $1,500.00, and I executed an extension of the note. No, sir, I don't have that letter with me. I have got it at home. No, sir, I couldn't get it here today.

RECROSS EXAMINATION

By Mr. Bickett:

No, I don't know any one who would lend me money on those two notes, who would buy the notes for any amount right now.

The Bankrupt rested.

R. E. FRIESENHAHN, a witness on behalf of the petitioner, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Bickett:

My name is R. E. Friesenhahn. I live at Selma, Texas. I testified at the previous hearing in this case. I have been in the court room and have heard the testimony of the other witnesses this morning as to the value of this land. I do not have any occasion to change my previous testimony. My previous testimony was that the land was worth $40.00 an acre and the improvements $2,000.00, that is still my opinion.

This picture that you have handed me of the barn is approximately a true representation of the barn on that place. The barn looks dilapidated right in this picture. I have seen the barn.

The fences are very poor and about to fall down.

Yes, sir; I am prepared, in my opinion, to state what is the reasonable cost for reproducing that barn, less depreciation. You could build a barn like that for a couple of hundred dollars, I am sure.

CROSS EXAMINATION

By Mr. Mosheim:

Yes, sir, I have built barns; I built my own barn; I used to farm.

As to how long I have been selling land for Martindale Mortgage Company, I only sold one tract for Martindale and that was last year. I haven't sold any since for the Martindale Mortgage Company.

REDIRECT EXAMINATION

By Mr. Bickett:

No, sir, I have no connection whatever with Martindale Mortgage Company. I am in the real estate business generally.

WILLIAM F. SCHULTZ, a witness on behalf of the petitioner, being first duly sworn, testified in substance as follows:

DIRECT EXAMINATION

By Mr. Bickett:

My name is William F. Schultz. I live in San Antonio, Texas, and I am in the real estate business. I also deal in farms and real estate in Guadalupe County.

I testified at the previous hearing in this cause. I have heard the testimony of the witnesses as to what purports to be the value of this land and improvements. No, I do not want to change my previous testimony. I testified at the previous hearing that the land was worth $40.00 an acre and the improvements were worth $2,000.00. I arrived at the value of the improvements as being $2,000.00 by looking at the buildings, then I figured the government depreciation, the government allows you four per cent deducted off your income tax, on farm buildings the life of the building is allowed at twenty-five years.

I sold some land at Selma, I sold a place last year at Selma. It is the same kind of land as this land. I sold it for $54.00 an acre, 167 acres. No, sir, I do not know of any recent sales, since I testified in the previous hearing, in the vicinity of that farm. I sold a place of 210 acres in Guadalupe County at $10,000.00. I also sold a place at Galle for $60.00 an acre, a very highly improved farm.

No, sir, I have no interest in that matter whatever. I have no connection with the John Hancock Mutual Life Insurance Company or with Martindale Mortgage Company.

CROSS EXAMINATION

By Mr. Mosheim:

Selma is several miles from Mr. Bartels' farm; it is over on the old highway, New Braunfels-San Antonio highway.

This farm is between the new highway and Schertz, the Cibolo Valley, it is considered very good land. Yes, the other piece of land that I testified about is miles away from this particular farm. None of them were situated anywhere around Clear Springs.

With respect to whether or not I have sold land for Martindale Mortgage Company, occasionally, well, I sell for all the different people, I handle land for the Aetna, for the Massachusetts Life, and I have handled land for the John Hancock Life Insurance Company. No, I don't handle lands exclusively for insurance companies, I handle land for private people, I sell more land for private people than for insurance companies.

No, sir, I am not usually used by the John Hancock Life Insurance Company and Martindale Mortgage Company in cases of this kind to value property for them. This is the first time I have ever been on the witness stand for them.

AGREEMENT OF COUNSEL

It is agreed by and between counsel for the respective parties hereto that the above and foregoing is a full, complete, true and correct statement in narrative form of all the evidence adduced and proceedings had upon the hearing of the above entitled and numbered cause on the 5th day of April, A. D. 1938, and that the Court on said date took into consideration, in addition to the above and foregoing. the Stenographer's Transcript of the proceedings before the Conciliation Commissioner and the conciliation commissioner's report which are on file among the papers of this cause and which shall be included as a part of the record, and that the Court likewise took into consideration the evidence of the witness D. D. Baker given on a previous hear-

ing of said cause, a witness for the Bankrupt, to the effect that the 100 acres of land on which the creditor, the John Hancock Mutual Life Insurance Company, has its lien was worth conservatively $12,000.00, and that upon such hearing the said D. D. Baker qualified himself as an expert relative to the value of property; and that the Court likewise took into consideration the evidence of the witness C. A. Krueger, a witness for the Bankrupt, who qualified himself as to the value of real estate in Guadalupe County, Texas, and testified that the 100 acres of land on which the creditor John Hancock Mutual Life Insurance Company has its lien was worth not less than $12,000.00. It is further agreed between counsel for the respective parties that the foregoing Statement of Facts, together with said Conciliation Commissioner's Report, and the substance of the testimony of the witnesses Baker and Krueger as set out in this agreement, shall constitute a complete Statement of the Facts adduced upon the hearing of the above entitled and numbered cause on the 5th day of April, A. D. 1938, and may be settled and filed as such.

T. E. MOSHEIM
Attorney for the Bankrupt.

HENRY, BICKETT & BICKETT
Attorneys for the Petitioner,
John Hancock Mutual Life
Insurance Company.

CERTIFICATE OF THE JUDGE

The Bankrupt, Benno Bartels, having tendered the foregoing as Bankrupt's Bill of Exceptions to the rulings of the Court upon the trial of this cause, and it appearing to the Court that the parties hereto, by their attorneys, have stipulated and agreed that the same contains a full and complete, true and correct, statement in narrative form of all the evidence adduced and proceedings had in said cause on the 5th day of April, A. D. 1938, and that it may be settled and filed as the Bill of Exceptions on this appeal;

It is, therefore, ordered that the same be, and it is hereby approved and ordered filed as the Bill of Exceptions on this appeal.

Entered at San Antonio, Texas, on this 16th day of May, A. D. 1938.

ROBERT J. McMILLAN Judge.

Filed May 16, 1938.

ORDER SETTING ASIDE ADJUDICATION IN BANKRUPTCY AND DISMISSING DEBTOR'S PETITION FOR COMPOSITION AND EXTENSION.

(Title Omitted).

This day came on to be heard in the above numbered and entitled matter the motion heretofore filed by John Hancock Mutual Life Insurance Company, praying that the order heretofore made herein on the 10th day of January, A. D., 1938, adjudicating the debtor, Benno Bartels, a bankrupt, be set aside, and, also, praying that the debtor's petition for composition and extension and all proceedings thereunder be dismissed; and the court, having heard and fully considered said motion, the evidence, and the argument of counsel, is of the opinion that said motion should be granted.

It is, therefore, considered, ordered, adjudged, and decreed by the court that the order heretofore made herein on the 10th day of January, A. D., 1938, adjudicating the said Benno Bartels a bankrupt, be and the same is hereby in all things set aside; and it is, further, ordered, adjudged, and decreed by the court that the debtor's petition for composition and extension and all proceedings thereunder be and the same are hereby dismissed.

Dated at San Antonio, Texas, this 5th day of April, A. D., 1938.

ROBERT J. McMILLAN
United States District Judge.

Entered: Bankruptcy Minutes, Vol. 3, Page 553.

Filed 5th day of April 1938.

ORAL OPINION OF COURT
Delivered April 5th, 1938.

(Title Omitted).

McMillan, District Judge.

As I indicated at the inception of this matter, this debtor was adjudged bankrupt under Section 75 (s), without notice and without an opportunity being given to any creditor to contest the matter. Later a motion was filed by John Hancock Mutual Life Insurance Company to dismiss the case on various grounds and the Court set a date for a hearing on the motion. After hearing the evidence fully and completely, the Court was of the opinion and so expressed himself that the matter could not be further maintained here for several reasons. First, the evidence did not clearly show that the debtor was within the purview of the Act in that for some time before the filing of the petition, he farmed the property, by tenants, on the shares, and the principal portion of his income was not derived from that operation; second, the Court was further of the opinion that the debtor's situation was such that there was no reason to believe that he could be rehabilitated and the bringing of the matter here was simply to postpone the evil day and increase the amount of his indebtedness without accomplishing any good to himself or to his creditors. For those reasons, I ordered the petition dismissed, but afterwards, upon reconsideration, as I stated at the outset today, I was of the opinion that I had probably taken the wrong procedure; that in as much as I had adjudicated the debtor bankrupt, the proper procedure would be to reopen the matter by having a motion filed to set aside that adjudication. That procedure has been approved by the Circuit Court for the Fifth Circuit in the case of Baxter v. Savings Bank of Utica, 92 Fed. (2d) 405. Accordingly, the Court set aside

the order dismissing this case and left it standing in statu quo, that is to say, with the debtor adjudicated under subsection (s).. The John Hancock Mutual Life Insurance Company has now filed this motion to set aside that adjudication on the ground that the order was not properly entered.

I see no reason, because of the hearing that has been had here today, to change my views as originally expressed with regard to the motion to dismiss.

One of the authorities, speaking with regard to the right of a farmer to advance under subsection (s), says this:

> "The Courts have, however, qualified the right of the farmer to advance into (s) merely upon the rejection of a proposal. Perfunctory compliance with the prior subsections is not sufficient to authorize proceedings in (s)." In re Shaeffer, 14 F. Supp. 807; In re Borgelt, 79 F. (2d) 929; In re Hilliker, 9 F. Supp. 948. "The farmer-debtor must first have submitted in good faith a valid proposal for the composition and/or extension of his indebtedness, and his failure so to do may be urged by the creditors when the debtor undertakes to amend his petition under (s)." Steverson v. Clark, 86 F. (2d) 330, In re Schaeffer, 14 F. Supp. 807; In re Borgelt, 79 F. (2d) 929; In re Hilliker, 9 F. Supp. 948; In re Vater, 14 F. Supp. 631.
>
> "The requisities for a valid proposal have been expressed variously. In general, it seems clear that a proposal must be definite and unconditional." In re Buxton's Estate, 14 F. Supp. 616. "Composition or extension proposal by farmer-debtor that he would pay secured creditors as promptly as loans could be obtained from named bank held insufficient." Citing In re Schaeffer, 14 F. Supp. 807.

"In re Borgelt, 79 F. (2d) 929 (C. C. A. 7th, 1935) (proposal contingent on loan from Federal land bank not valid). It must be feasible and reasonably calculated to effect a debt liquidation. Helbstab v. Equitable Life Assur. Soc. of U. S., 91 F. (2d) 655, 659 (C. C. A. 10th, 1937); In re Duvall, 14 F. Supp. 799 (W. D. Va. 1935); In re Wylie, 16 F. Supp. 193, 194 (W. D. S. C. 1936); In re Schaeffer, supra; In re Borgelt, supra; In re Siske, C. C. H. 1936 Bankruptcy Law Serv. Sec. 3931 (M. D. N. C. 1936); see also note 6 to Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, 300 U. S. 440 (1937). It has been likewise held that the proposal must be equitable. In re Duvall, supra; In re Vater, supra; In re Schaeffer, supra. It must be submitted promptly. In re Schaeffer, supra; In re Borgelt, supra; In re Sterba, 74 F. (2d) 413 (C. C. A. 7th, 1935)."

Now, in the Baxter case, decided by the Circuit Court for the Fifth Circuit, to which I referred a moment ago, the Court there, speaking on the matter of good faith in the proposal said:

"It has been pointed out that good faith in this connection means more than the absence of actual fraud. A bona fide effort to compromise with creditors is made a prerequisite to the relief afforded under subsection (s). * * * The primary purpose of Section 75 is the composition and extension of the debts of distressed farmers. The function of subsection (s) is to provide temporary relief to those who might be able to adjust their difficulties but have failed in the preliminary proceeding. Its presence in the Act has the additional

effect of providing an inducement to secured creditors to accept a feasible plan when offered. Thus, its presence in the Act is in aid of the composition provisions, resort to which is made a prerequisite to the relief afforded. It may not be treated as an end in itself, with the other proceedings as mere procedural steps to be taken toward the relief there afforded. It follows that the offer of composition or extension was not made in good faith."

Having these principles of law in view, I will turn to the testimony of the debtor, Bartels, before the Conciliation Commissioner as to whether a definite offer of compromise or extension was made prior to the time that he was adjudicated under subsection (s).

On page 22 of the transcript occurs the first reference to the matter. He is there asked:

"Q. Do you have any plan or proposal to submit to your creditors, Mr. Bartels, as a composition or extension of your debts in these proceedings?

"A. No. I want to pay everybody that I owe, sure.

"Q. You don't have any definite, concrete plan now, do you?

"A. No, not exactly, but I want to pay everybody I owe.

"Q. How are you going to raise the money to farm the land this coming year? Can you tell us how you are going to raise the money to farm it?

"A. I will just have to get out and make a little."

Now, on page 41 the matter was again approached; he was asked:

"Q. Now, let me ask you again. Do you have any definite proposal to make to your creditors here today as

to how you are going to pay up your debts and what your plan is?

"A. Well, my plan is, I am going to try to work it like I did before because I am going to pay everybody; I want to pay everybody, and I am doing my best to try and pay everybody.

"Q. Don't you realize that your interest, taxes and all these debts you owe is more than the income from the property?

"A. Maybe so, but it just depends upon—I am going to try to make it if I have a little chance, you know. When we have no work on the farm I am going to try to make a little money on the outside."

Again the matter came up on page 53 of the transcript. There the Commissioner, who seemed to take a friendly attitude toward the debtor, to attempt to protect his interest, as he properly should have, asked him:

"THE COMMISSIONER: Mr. Bartels, have you got any suggestion or proposition to make as to how you could go ahead and pay off this debt, these delinquencies, what disposition you could make of them to satisfy your creditors and get them to give you more time on the balance?

"MR. BARTELS: Well, if they give me time I think I can work out all right, because if I get that money in—I am going to try to work my own self, as I say, I think I can work out all right, just so they give me a chance."

Again on page 56 of the transcript the Commissioner asked him:

"Q (by the Commissioner). Mr. Bartels, you say you do not have any definite proposition to offer them. You are willing, however, to turn any money that you get from your store and convert those lots into money and apply that on the payment of the Martindale Mortgage Company debt?

"A. Yes, sir.

"Q. And then you propose to work out the remainder of your debt to the Martindale Mortgage Company, including the current interest, within the next three years, I believe you stated a while ago, is that correct?

"A. Yes, sir.

"Q. Now then, that is your proposition so far as the Martindale Mortgage Company debt is concerned? Now, do you feel that your other creditors that hold these personal notes against you, that you will be able to satisfy them to wait until you—

"A. I think so, either that—I don't know if I can make it, but that money that I have got loaned out there, that $1,800.00—

"Q. You think that you could probably pay them out of the money that you collect from the people that owe you?

"A. Yes.

"Q. Now would you be willing, if you could collect any money that is outstanding now, to apply that on your delinquent debts?

"A. Yes, sir, sure, I want to pay all I can.

"Q. All right, is there anything more that you can do here? Is there anything else that you can offer that you know of?

"A. Not at the present, no, sir. I want to try to do all I can."

The matter is again brought up on page 60 of the transcript by the Commissioner:

"THE COMMISSIONER: Well, that is about the only proposal that I can see that can be made; I don't know that there is anything else that can be offered."

He turns to Mr. Bartels and says:

"Now, as I understand it, that is all the proposal, that is all you can do, that is the only suggestion you have to make, Mr. Bartels?

"MR. BARTELS: Yes, sir.

"THE COMMISSIONER: Now, then, if you gentlemen feel that you should accept it, you, of course, are the ones who will have to be satisfied because you represent the majority amount of the total debts by far.

"MR. LESLIE: There is not anything definite in it, Mr. Miller. It is just a suggestion, there is nothing definite there that I can see.

"MR. BICKETT: Based on his hopes and expectations."

The transcript reflects further, without attempting to sort out the parts of it, that he possibly had an interest in a two hundred or two hundred and fifty dollar stock of merchandise which he hoped to sell, and if he did, he was willing to pay that on his debts. The transcript further shows that he owned some lots in San Antonio which he had never seen, that might be worth five hundred dollars, but as to that he did not know.

It seems perfectly obvious that he has not made any proposal, viewing this record here in the most liberal and friendly light to him, that can be construed as a bona fide good faith offer for an extension or composition. He has nothing definite to offer. There is no offer made in writing at all, but waiving that point and construing this conversation had there during this examination as constituting his offer, then we can see nothing to warrant the Court in holding that there has been a valid offer of composition or extension as defined by the authorities or a proposal that could be construed as being equitable. That being the case, of course, he would not be entitled under subsection (s) to be adjudicated a bankrupt.

Furthermore, upon the other proposition as to whether there is any reasonable probability of his rehabilitation, the evidence indicates now that the indebtedness against this

particular one hundred acres at this time amounts to something over $8,000.00. There is interest now due, dating back over three years. There are items of interest amounting to $45.93, $8.86, $390.00, $49.79, $390.00, $24.44, $375.92, and $390.00.

Your claim is drawing six or eight per cent?

MR. BICKETT: Six per cent is my understanding.

THE COURT: At six per cent the interest charges will run between $400.00 and $500.00 a year.

MR. MOSHEIM: It has been running $390.00, I believe, in there.

THE COURT: Six per cent—

MR. BICKETT: It bears six per cent on the principal.

THE COURT: And ten per cent on past due interest?

MR. BICKETT: Yes, sir.

THE COURT: The interest charges are going to run $400.00 or $500.00 a year. In addition to that, there is over $1,600.00 past due interest. Furthermore, taxes are to be paid. If the debtor and his family are going to live on the farm and farm it, their living expenses manifestly will have to come from the farm. The record here shows that he practically has no other source of income if he abandons the store, which he apparently has, so he must look to the farm alone for his living expenses. He bought a tractor, trading for it some mules, and he owes on it something between $500.00 and $600.00 which only increases the financial difficulty in which he finds himself.

It is purely speculative as to what can be made on this farm, and we have no better light by which we can guide our feet than the lamp of experience. For a number of years, this farm has not paid any such fanciful returns as some of the witnesses seem to think it should; it has been shown that within the last three or four years, he has not

realized more than $300.00 or $400.00 from it. Of course, it has been testified that was because he did not farm it personally; that he has been in bad health. We have no assurance here that conditions in the future will be better than in the past. Assuming that he did make $300.00 to $400.00 from the farm, it would take that much to pay the current interest without making any payments on past due interest. Then we have the matter of operating expenses, living expenses and taxes to be considered.

The $1,800.00 worth of notes that he refers to are apparently long in arrears, and one of them, the larger of the two, is barred by limitation. Even though the indebtedness is admitted by the party who owes it, still there is nothing to indicate that there is any possibility of his paying it.

The evidence is in conflict as to the value of the land. Separating the land from the improvements, certain of the debtor's witnesses placed the value of the land at $70.00 per acre and the improvements at $5,000.00 or $6,000.00. Witnesses for the creditor placed the value of the land at around $40.00 and the value of the improvements around $2,000.00.

The Court fully realizes that it ought not to apply emergency prices to a matter of this kind or foreclose the possibility of rehabilitation on the theory that immedate liquidation could not be had. However, there is nothing here to indicate to the Court that there is any reasonable probability of this property being sold for enough to give any substantial equity at all to the debtor. The charges are mounting rapidly and any equity that may exist will be wiped out. Accordingly, the Court finds that there is no reasonable probability of the financial rehabilitation of this debtor. Within the purview of the law and under the decision of the Circuit Court in the Baxter case, the Court is

of the opinion that the order adjudicating the debtor a bankrupt under subsection (s) was improperly entered and should be set aside and the cause dismissed. That will be the order of the Court.

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April 23rd, 1938.

The Clerk will file this transcript of the Courts oral opinion with the papers in the case.

McMILLAN Judge.

Filed 23rd day of April 1938.

PETITION FOR APPEAL.

(Title Omitted).

TO THE HONORABLE ROBT. J. McMILLAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF TEXAS:

The above named debtor, Benno Bartels, conceiving himself aggrieved by the Decree made and entered on the 5th day of April, 1938, in the above entitled cause, does hereby appeal from said Order and Decree of the United States District Court for the Western District of Texas, San Antonio Division, to the Circuit Court of the United States for the Fifth Circuit, sitting at New Orleans, Louisiana, for the reasons specified in the Assignment of Errors filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said Order was made, duly authenticated, may be sent to the United Circuit Court of Appeals for the Fifth District.

T. E. MOSHEIM

May 5th, 1938 Attorney for Benno Bartels

Filed May 5, 1938.

ASSIGNMENTS OF ERROR.

(Title Omitted).

On this the 5th day of May, 1938, comes the petitioner, Benno Bartels, by the undersigned Attorney, and says that the Decree setting aside the Order adjudicating the petitioner a bankrupt and dismissing the proceedings, entered in this cause on the 5th day of April, 1938, is erroneous and against the just rights of the said petitioner for the following reasons:

I.

Because the evidence clearly and uncontradictedly showed the petitioner to be a farmer within the purview of Section 75S of the Bankruptcy Act.

II.

Because the evidence showed that the petitioner had a substantial equity in the real estate upon which the John Hancock Mutual Life Insurance Company has a lien, and referred to in these proceedings, being 100 acres of land out of the A. M. Esnaurizar XI League Grant in Guadalupe County, Texas; that is to say, that petitioner has an equity in said property over and above the debt of the John Hancock Mutual Life Insurance Company, which has filed a claim for $7284.94 not counting attorney's fees.

III.

Because it was error to dismiss this proceeding upon the supposition that no substantial equity was owned by petitioner in said property as such is not a prerequisite to the right to be adjudged a bankrupt under Sub-section (s) Section 75 of the Bankruptcy Act.

IV.

Because the evidence preponderantly and clearly showed that the petitioner had every reasonable probability of being able to rehabilitate himself within the three years allowed under Section 75S, without loss or injury to the moving creditor, John Hancock Mutual Life Insurance Company.

V.

Because the proceedings before the Conciliation Commissioner showed that despite the evidence quoted by the Court in rendering its decision, the debtor made a proposition of compromise, which was filed by the Conciliation Commissioner in this cause.

VI.

Because the evidence clearly showed that the debtor proposed to operate his property that within the three year period he would pay off all delinquent interest and refinance his loan, and that this proposition was made in good faith and had a reasonabl probability of success.

VII.

Because the debtor was entitled under the Act to have his property appraised and be given an opportunity to purchase same at the appraised price, and the proceedings were dismissed prematurely and before such appraisal.

WHEREFORE, this petitioner prays that said Decree be reversed and that said Circuit Court of Appeals for the Fifth Circuit enter an Order and Decree directing that said Judgment and Decree of the District Court setting aside the adjudication in bankruptcy and dismissing this proceeding be held for naught, and that this proceeding be reinstated and acted upon as under Sub-section S of Section

75 of the Bankruptcy Act and administered accordingly, and for such further orders and decrees as he may be entitled to in the premises, for all of which petitioner prays.

T. E. MOSHEIM
Attorney for Benno Bartels.

Filed 5th day of May, 1938.

ORDER ALLOWING APPEAL.

(Title Omitted).

On this the 16th day of May, A. D., 1938, came on to be considered the application of the debtor, Benno Bartels, heretofore filed, for appeal to the United States District Court of Appeals for the Fifth Circuit, and it is hereby ordered that said appeal be granted.

ROBERT J. McMILLAN
Judge, United States District Court
for the Western District of Texas.

ENTERED: Bankruptcy Minute, Volume 3, page 581.

Filed May 16, 1938.

APPEAL BOND.

(Title Omitted).

Know all men by these presents that we, Benno Bartels, as Principal, and D. D. Baker, Frank D. Quinn and Joe P. Gibbs, as Sureties, are held and firmly bound unto all parties interested in this proceeding, in the full sum of Five Hundred ($500.00) Dollars, the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

SEALED AND SIGNED at Seguin, Texas, this 5th day of May, A. D. 1938.

WHEREAS, heretofore, on the 5th day of April, 1938, in the United States District Court for the Western District of Texas, San Antonio Division, in the above numbered and styled cause, a Judgment was rendered granting the Motion of the creditor John Hancock Mutual Life Insurance Company and setting aside the prior Order of this Court adjudicating the debtor a bankrupt under Sub-section S of Section 75 of what is known as the Frasier-Lemke Farm Relief Act, and dismissing the debtor's petition to be adjudged such bankrupt, by reason of which said debtor feels aggrieved and desires to appeal this case to the Fifth Circuit Court of Appeals, sitting at New Orleans, Louisiana.

NOW, the condition of the above obligation is such that if said Benno Bartels shall prosecute said appeal to effect and answer all costs if he fail to make said plea good, then

the above obligation to be void, else to remain in full force and virtue.

SEALED AND DELIVERED in presence of:

BENNO BARTELS Principal
D D BAKER
FRANK D. QUINN
J. P. GIBBS
Sureties

AILEEN McKEOGH
GLORIA VELA
Witnesses

Approved by:
ROBERT J. McMILLAN
District Judge.

THE STATE OF TEXAS,)
COUNTY OF GUADALUPE.)

I, J. F. Fischer, Clerk of the District Court of Guadalupe County, Texas, do hereby certify that the signatures of the principal and sureties on the foregoing Bond are genuine, and that if said Bond were presented to me for approval, I would approve same.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 5th day of May, A. D. 1938.

J. F. FISCHER
Clerk of the District Court of Guadalupe County, Texas.

(Seal)

Filed May 16, 1938.

WAIVER OF ISSUANCE AND SERVICE OF CITATION.

(Title Omitted).

In the above styled and numbered cause, comes now L. M. Bickett, Attorney for the John Hancock Mutual Life Insurance Company, and waives the issuance and service of Citation and notice of appeal in connection with the Bankrupt Benno Bartels' application for appeal to the Honorable Circuit Court of Appeals for the Fifth Circuit at New Orleans; and said Attorney, acting for said party, further acknowledges receipt of a copy of the Praecipe filed in this cause by the Appellant, Benno Bartels, and agrees that the same contains all matters necessary to form a part of the record in this cause on appeal, save and except that there shall likewise be included in said record the Reply of the Bankrupt, Benno Bartels, to the Motion of the creditor John Hancock Mutual Life Insurance Company to dismiss the proceeding, the Order extending the time for filing the Transcript on appeal, and this Waiver and Agreement.

L. M. BICKETT
Attorney for John Hancock Mutual
Life Insurance Company.

I, T. E. Mosheim, Attorney for the Bankrupt, Benno Bartels, hereby agree that the additions to the record set forth in the foregoing Waiver shall be made to such record.

T. E. MOSHEIM
Attorney for the Bankrupt, Benno Bartels.

Filed June 20, 1938.

PRAECIPE FOR RECORD ON APPEAL.

(Title Omitted).

To the Clerk
United States District Court
San Antonio, Texas.

In re: No. 1988, In Bankruptcy
Benno Bartels.

Dear Sir:

In the above case you are requested to prepare, and have prepared a record to be transmitted to the Circuit Court of Appeals including the following:

1. Caption.
2. Decree of the Court dated December 2, 1937, appointing conciliation commissioner on application for extension and composition. (Order of reference to commissioner)
3. Report of Conciliation Commissioner showing result of meeting of December 21st, 1937.
4. Application signed by Benno Bartels under date of January 4th, 1938, to be adjudged a bankrupt under subsection S of Section 75.
5. Appointment of Alvin P. Mueller as referee per decree of court of date January 10, 1938. (Order of adjudication and reference)
6. Application of John Hancock Mutual Life Ins. Company to dismiss proceeding.
7. Reply of Bankrupt to Motion of John Hancock Mutual Life Ins. Company.
8. Such testimony as is required to be shown in the record and introduced at the last hearing. (Stenographic report of hearing before conciliation commissioner Dec. 21, 1937)

9. Statement of evidence.
10. Decree of Court, dismissing application to be adjudged bankrupt. (Order setting aside adjudication and dismissing cause)
11. Oral opinion of the Court.
12. Application for appeal.
13. Assignments of error.
14. Order allowing appeal.
15. Appeal bond.
16. Waiver of issuance and service of citation.
17. Praecipe.
18. Clerk's certificate.

Yours truly,

T. E. MOSHEIM

T. E. Mosheim, Attorney
for Benno Bartels.

Filed 2nd day of June, 1938.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF TEXAS, ss.

I, Maxey Hart, Clerk of the District Court of the United States for the Western District of Texas, do hereby certify that the foregoing on 116 pages is a true and correct copy of proceedings had and orders entered in the matter of the Motion of John Hancock Mutual Life Insurance Company, a creditor, to set aside adjudication of bankruptcy and to dismiss Debtor's petition for composition and extension, in Cause No. 1988 in Bankruptcy, styled In the Matter of Benno Bartels, Debtor, as the same appear on file and of record in this office, except that titles of documents and all endorsements thereon except dates of filing have been omitted.

I further certify that said record embraces only such pleadings, process and orders as are specified in the praecipes filed herein by appellant and appellees.

WITNESS my official signature and the Seal of said District Court, at office in the City of San Antonio, Texas, this the 6th day of July, A. D. 1938.

MAXEY HART, Clerk of said Court,

(Seal) By J. F. CAROLINE, Deputy.

[fol. 118] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 11, 1938

No. 8868

BENNO BARTELS

versus

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY et al.

On this day this cause was called, and, after argument by T. E. Mosheim, Esq., for appellant, and L. M. Bickett, Esq., for appellees, was submitted to the Court.

[fol. 119] OPINION OF THE COURT—Filed December 22, 1938

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8868

BENNO BARTELS, Appellant,

versus

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

(December 22, 1938)

Before Sibley, Hutcheson and Holmes, Circuit Judges

SIBLEY, Circuit Judge:

The case concerns the proper application of Subsection (s) of Sect. 75 of the Bankruptcy Act, 11 U. S. C. A. Sect. 203(s). Benno Bartels as a farmer applied for a composition and extension of his debts and his petition was approved and referred to the Conciliator. At the creditors' meeting Bartels expressed a willingness to pay in full if

given time, and proposed to work his farm himself and to apply the proceeds of the crops to his debts, selling and paying over at once property not needed on the farm. Theretofore he had let it out on shares because he had [fol. 120] hurt his back, and poor crops had been made. He came to an agreement with his unsecured creditors but John Hancock Mutual Life Insurance Company held a mortgage on the farm for $6,000 principal, interest on which was three years in arrears, and this debt was a majority in amount of all his debts. This creditor required present payment of all arrearages, and since Bartels could not arrange cash therefore he could make no acceptable proposal. He then amended his petition and prayed to be adjudged a bankrupt under Subsection (s). On Jany. 10, 1938, he was so adjudged and the case re-referred to the Conciliator as referee. Bartels appears to have continued in possession of the farm, but under what terms does not appear. About ten weeks later the Insurance Company moved, not to have its security sold, but that the adjudication in bankruptcy be set aside and all proceedings dismissed. The bankrupt resisted this. On a hearing the judge held there was no reasonable probability of the mortgaged property being sold for enough to give the debtor any substantial equity, and that accordingly there was no reasonable probability of his financial rehabilitation. The motion was granted, the adjudication set aside and the cause dismissed, largely on the authority of our decision in Baxter vs. Savings Bank of Utica, 92 Fed. (2) 404. Other decisions from the Circuit Court of Appeals cited to support the judgment are: In Re Borgelt, 79 Fed. (2) 929, approving and affirming 10 Fed. Sup. 113; Knotts vs. First Carolinas Joint Stock Land Bank, 86 Fed. (2) 551; and Massey vs. Farmers & Merchants Bank, 94 Fed. (2) 526. Of these the first rested on two grounds, that the debtor had not made a good faith offer, and there were no assets to be administered. The second was really decided on the erroneous ground that Subsection (s) was unconstitutional. The third squarely took the position that Subsection (s) cannot be invoked unless the initial offer made to creditors has come up to certain rather vague standards which would show good faith.

[fol. 121] Confusion has arisen, we think, touching the way in which Subsection (s) fits into the scheme of bankruptcy, as to when the stay provided therein may be denied, and how security holders are to have their rights preserved.

Farmers were favored in the original Bankruptcy Act in that while they might voluntarily go into bankruptcy, they could not be forced in. This is continued in proceedings under Section 74 (l) 11 U. S. C. A. Sect. 202(l). Section 75 deals only with farmers, and as stated at its end (Subsection (s) (6)) is emergency legislation, limited originally to five years, and not to be applied where the judge finds no emergency to exist locally. The emergency was the great economic depression which in 1933 had rendered farming unprofitable, and farm lands unsalable for their normal value. To force the sale of farms under such circumstances would be a hardship on the farmer who on a basis of normal values was really solvent, and would cause those who were insolvent to lose their means of livelihood, and probably in great numbers go to swell the ranks of the unemployed and those needing public relief. The surplus value inherent in the farms would, after economic revival, accrue to speculative buyers, and aggravate the social evil of the rich becoming ever richer and the poor poorer. Creditors as a rule do not wish farms, and would under safe arrangements prefer to extend time or to compromise their debts, if it would enable their farmer debtor to continue in business and pay them. Section 75 is intended to serve all these interests while seeking mainly to help distressed farmers so far as that may rightly be done. Its benefits are expressly extended both to those who cannot meet their debts as they mature but are solvent in a bankruptcy sense, and to those who are insolvent. Subsection (c).

The applicant under Section 75 is at first not a bankrupt, but a debtor. The aid of the court is first extended to secure a voluntary adjustment with his creditors, both [fol. 122] secured and unsecured, which will enable him to continue to farm, the will of a majority in number and amount controlling the minority. If this adjustment cannot be accomplished, the farmer may wholly drop the matter, or he may turn to Subsection (s) and "amend his petition, asking to be adjudged a bankrupt." When so adjudged he becomes a bankrupt under the bankruptcy law, required to surrender his property except exemptions, and entitled to ask a discharge from his debts. But Subsection (s) introduces for a farmer who timely invokes it very important changes in the applicable bankruptcy law. Instead of immediately surrendering his property, and especially his farm and equipment, he may retain them, or so much as he requests, for three years, paying a reasonable rent for

them, and may even at the appraised value redeem them on terms fixed by the court, the redemption money then becoming part of the estate to be distributed in bankruptcy in place of the property itself. All this, as respects unsecured creditors, has been considered to be within the bankruptcy power of the federal government. But secured creditors whose liens antedate the law have as to their security vested rights which must be effectuated. The present Subsection (s) has been construed as sufficiently flexible to care for them. Wright vs. Vinton Branch Bank, 300 U. S. 440. A creditor with a mortgage on the farm may be able to force a sale which will defeat a rehabilitation of the farmer which might otherwise have been accomplished. And, although there be no secured debts, or they are not urgently pressed, rehabilitation may appear to be impracticable, or pending it the farmer may breach his obligations, and then ordinary bankruptcy procedure may be ordered to go forward as Subsection (s)(3) declares. In neither case under a proper construction of Section 75 is the entire proceeding to be dismissed. On the contrary when the rehabilitation [fol. 123] sought by Subsection (s) fails, the farmer is still a bankrupt, and his estate is to be administered and his debts discharged as in other cases of voluntary bankruptcy. "In proceedings under this Section (Section 75) except as otherwise provided therein, the jurisdiction and powers of the court, the title powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer, and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition asking to be adjudged a bankrupt was filed with the clerk * * *." Subsection (n). Much more is the general bankruptcy law to be applied after an adjudication as a bankrupt has been actually made under Subsection (s). The only mention of dismissing the proceedings which we find is in Subsection (l), when a composition has been carried out, or optionally when an extension proposal has been confirmed.

The courts have spoken of a lack of "good faith" in invoking Section 75 as a cause for dismissing the whole proceeding, and some countenance has been given the idea in a footnote to the opinion in the case of Wright vs. Vinton Bank, supra. We do not understand it to be a part of the court's opinion. The note mistakenly states that good faith is made

a requirement of the initiation of a proceeding under Sect. 75. That requirement appears in Sect. 74(a). Section 75 nowhere mentions initial "good faith" as a prerequisite to invoking Subsection (s), or going through bankruptcy if rehabilitation under that Subsection fails. The good faith of the offer and acceptance is to be enquired into by the court before confirming a composition or extension accepted by the majority of creditors, Subsection (i), and that is the only mention of good faith in Sect. 75. If the farmer is desirous of continuing to farm and is willing to give his creditors [fol. 124] their full rights in his property as the law fixes them hoping to obtain from them such extension or compromise as will enable him to work out, that we think is all the good faith necessary. That he has no equity in his property but is actually insolvent is no bar. The statute says so in Subsection (c). That his creditors refuse to compromise or give time so as to enable him to farm, merely gives him the right to proceed in bankruptcy under Subsection (s) and thus to try conclusions with the judge. That Bartels in this case had no plan to present to his creditors except to offer to go to work personally on the farm with his grown son, and apply presently to his secured debt what he could raise by selling some mercantile property and vacant lots, hoping to pay all in full finally, does not require the dismissal of his proceedings. His unsecured creditors were actually content to adopt the plan. The secured creditor whose debt was a majority in amount was not content. Bartels thereupon rightly asked adjudication as a bankrupt, invoking Subsection (s). His secured creditor had the right thereafter to ask the court for a sale or other disposition of the security, if the delay and rentals fixed under Subsection (s) would impair his vested rights. This he did not do. He had no right to set aside the adjudication and dismiss the proceeding. If there is no substantial equity, actual or potential, above the mortgage debt reasonably to be saved, a sale of the farm may be ordered, defeating of course rehabilitation, but the adjudication would stand and administration in bankruptcy continue. It was error in this case to set aside the adjudication and dismiss the proceedings.

What we said about Subsection (s) in Dallas Land Bank vs. Davis, 83 Fed. (2) 322, we see no occasion to modify. In Baxter vs. Savings Bank of Utica, 92 F. (2) 404, the disposition of the case was correct, but some of the language touching initial good faith as a prerequisite to invoking Subsec-

[fol. 125] tion (s) and indicating that the adjudication under Subsection (s) should have been set aside to make way for another adjudication we now think was inaccurate. The adjudication under Subsection (s) is good if the farmer never makes any application to retain possession of his property and for its appraisal and a stay of all other proceedings. The language of the statute shows that such application is optional, and the option may be lost by failure to assert it at the times the statute names. "Such farmer may, at the same time, or at the time of the first hearing, petition the court that all his property * * * be appraised, etc." If no such petition is made, or if later the benefits of possession and stay are defeated, the adjudication stands as a voluntary adjudication in bankruptcy. Appropriate proceedings ought to follow.

The judgment rendered on the motion of the Insurance Company is reversed and the case ordered reinstated for further proceedings not inconsistent with this opinion.

HOLMES, Circuit Judge, dissenting:

The district court found that there was no reasonable hope of appellant rehabilitating himself with the property involved in this estate, and that the petition was not filed in good faith. The record amply supports this finding, and the majority opinion does not question it. Nevertheless, the majority opinion holds that the court was without power to dismiss the proceedings.

In sustaining the constitutionality of the act, the Supreme Court held that the proceeding could be maintained only as a [fol. 126] bona fide effort on the part of the debtor to rehabilitate himself, and that this was without regard to any provision of the act specifically requiring good faith. In a footnote to its opinion, it says: "Relief under Sec. 75 (s) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Sec. 75 (a) (r)." Wright v. Vinton Branch, 300 U. S. 440, 462. It further states that the proceedings will be halted at the outset if the debtor is beyond hope of rehabilitation. Such a pronouncement, when made the basis for a holding that an enforced delay in favor of one class of litigants for a period of three years does not violate the due-process clause of the Constitution, should not be disregarded.

Good faith has been defined as lack of pretense. A proceeding such as this, without hope of rehabilitation, is a mere pretense. The majority says that, because there is a

field of judicial action within which the court may move and act, the power to withhold its process in aid of a pretense is denied to it, and that, as a mere ministerial funtionary, it must proceed only upon such motions and petitions as are expressly provided for in the act. This is not within the usual concept of a judicial tribunal. The Supreme Court held otherwise, and pointed out that the practical administration of the section in the lower courts already gave ample evidence of substantial protection to creditors. For these reasons, I think the judgment of the district court should be affirmed.

The decision of this case is unfortunate in view of our decision in John Beverly Henderson, Debtor, No. 8758, this day decided. The two cases were submitted at the same term of court and were considered together; but, owing [fol. 127] to the fact that exactly the same judges did not sit in both cases, a different result is reached.

[fol. 128] JUDGMENT

Extract from the Minutes of December 22, 1938

No. 8868

BENNO BARTELS

versus

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court rendered on the motion of the Insurance Company in this cause be, and the same is hereby, reversed and the case ordered reinstated for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellee, John Hancock Mutual Life Insurance Company, be condemned, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Holmes, Circuit Judge, dissenting."

[fols. 129-136] PETITION OF APPELLEE, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY FOR REHEARING—Filed January 9, 1939

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 8868

BENNO BARTELS, APPELLANT,

versus

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION.

PETITION OF APPELLEE, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, FOR REHEARING.

Now comes John Hancock Mutual Life Insurance Company, appellee in the above numbered and entitled cause, and petitions the court to grant it a rehearing in this cause and, upon such rehearing, to set aside the judgment and opinion of this court heretofore rendered herein on December 22, 1938, whereby the judgment of the District Court was reversed; and, as grounds for this petition for rehearing, appellee respectfully represents to the court:

—2—

FIRST GROUND.

The court erred in its decision and judgment in this case, whereby the judgment of the District Court, dismissing the debtor's petition and all proceedings thereunder, was reversed and the case was ordered reinstated for further proceedings, because such decision and judgment is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright vs. Vinton Branch Bank*, 300 U. S. 440, 462, 81 L. ed. 736, 743, wherein the Supreme Court of the United States has distinctly held: (1) that "Relief under Section 75 (s), (Bankruptcy Act as amended, 11 U. S. C. A., Sec. 203 [s]), may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Section 75 (a)-(r). (Bankruptcy Act as amended)"; (2) that a debtor's proceeding under Section 75 of the Bankruptcy Act will be halted at the outset" if the debtor is beyond all reasonable hope of financial rehabilitation; and (3) that, without regard to any provision of the Act, (Section 75 of the Bankruptcy Act, 11 U. S. C. A.), or any specific requirement that the debtor's petition be made in good faith, nevertheless, good faith on the part of the petitioning debtor was required.

Statement.

The majority opinion of this court in this cause holds that the language of Justice Brandeis of the Supreme Court of the United States, appearing in the footnote to the opinion of the court delivered by him in the case of *Wright vs. Vinton Branch Bank, supra,* constitutes no part of the opinion of the Supreme Court in that case, and, thereupon, the majority declined to follow such language. In the dissenting opinion in this case by Circuit Judge Holmes, it is recognized that the language in the footnote of Justice

Brandeis in *Wright vs. Vinton Branch Bank, supra,* does constitute a controlling part of the opinion of the Supreme Court in that case. And the majority opinion in this case is directly in conflict with the holding of the Supreme Court of the United States in the case of *Wright vs. Vinton Branch Bank, supra,* in the three respects pointed out in the foregoing "First Ground" of this petition for rehearing

SECOND GROUND.

The court erred in its decision and judgment in this case in overruling and rejecting the holding previously made by it in the case of *Baxter vs. Savings Bank of Utica,* 92 F. (2d) 404, in which case this court had said:

> "It has been pointed out that good faith in this connection means more than the absence of actual fraud. A bona fide effort to compromise with creditors is made a prerequisite to the relief afforded under subsection (s). * * * The primary purpose of Section 75 is the composition and extension of the debts of distressed farmers. The function of subsection (s) is to provide temporary relief to those who might be able to adjust their difficulties but have failed in the preliminary proceeding. Its presence in the Act has the additional effect of providing an inducement to secured creditors to accept a feasible plan when offered. Thus, its presence in the Act is in aid of the composition provisions, resort to which is made a prerequisite to the relief afforded. It may not be treated as an end in itself, with the other proceedings as mere procedural steps to be taken toward the relief there afforded. It follows that the offer of composition or extension was not made in good faith."

STATEMENT.

It is plainly shown, by the majority opinion in this case, written by Circuit Judge Sibley, that the decision in this case is in conflict with the *Baxter case, supra,* and that the court now, in effect, overrules the decision previously rendered by it in the *Baxter case,* because it is said in the majority opinion, with respect to the *Baxter case,* "some of the language touching initial good faith as a prerequisite to invoking subsection (s) and indicating that the adjudication under subsection (s) should have been set aside to make way for another adjudication, we now think was inaccurate." And, in order to make the rejection of the holding in the *Baxter case, supra,* unmistakable, in the dissenting opinion of Circuit Judge Hutcheson in the case of *John Beverly Henderson, Debtor,* No. 8758, decided on the same day as this case, it is said: "In *Bartels vs. John Hancock Mutual Life Insurance Company* this day decided, the majority is disapproving the holding in the *Baxter case,* that the right of a farmer to ask that he be adjudged a bankrupt under subsection (s) is qualified by, indeed is dependent upon, whether his proposition for a composition under preceding subsections is deemed to have been made in good faith." Thus, the conflict between the decision in this case and the prior decision of this court in the *Baxter case* is apparent.

THIRD GROUND.

The court erred in rendering its decision and judgment in this case, whereby the judgment of the District Court was reversed, because such decision is in direct conflict with the decision rendered by this Honorable Court on the same day in the case of *John Beverly Henderson, Debtor,* No. 8758, on the docket of this court, in which case the

majority follows and adheres to a previous decision of this court in the case of *Baxter vs. Savings Bank of Utica*, 92 F. (2d) 402.

STATEMENT.

It is apparent, from the opinions delivered in this, the *Bartels* case, and in the *John Beverly Henderson* case, both decided by this court on the same day, that the two decisions are in direct and irreconsilable conflict. Indeed, the court recognizes that fact, as is shown, upon the one hand, by the dissenting opinion of Circuit Judge Holmes in this, the *Bartels* case, and, on the other hand, by the dissenting opinion of Circuit Judge Hutcheson in the *John Beverly Henderson* case.

FOURTH GROUND.

The court erred in its decision and judgment reversing the judgment of the District Court, which dismissed the debtor's petition and proceedings thereunder, because the decision of a majority of the court has misconstrued and misapplied Section 75 (s) of the Bankruptcy Act as amended, (11 U. S. C. A. Section 203 [s]), in that the court's construction, interpretation, and application of said statute is in conflict with a prior construction, interpretation, and application of said statute as made by the Supreme Court of the United States in the case of *Wright vs. Vinton Branch Bank*, 300 U. S. 440, 462, 81 L. ed. 736, 743.

FIFTH GROUND.

The court erred in its decision, whereby the judgment of the District Court dismissing the debtor's petition and all proceedings thereunder was reversed, because the court thereby misconstrued, misinterpreted, and misapplied Sec-

tion 75 (s) of the Bankruptcy Act as amended, (11 U. S. C. A. 203 [s]), so as to deny to this appellee, John Hancock Mutual Life Insurance Company, due process of law and to deprive it of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, in that appellant will be postponed and delayed, to its detriment and loss, in the enforcement of its debt and lien where, according to the unrejected findings of the trial court, the debtor had no equity in his farm, the debtor's petition was not filed in good faith in a bona fide effort to obtain a composition and extension of his debts, and there was no reasonable hope of the debtor's financial rehabilitation.

STATEMENT.

As said by Circuit Judge Holmes, in his dissenting opinion in this case, the majority opinion does not reject the findings of the District Court to the effect: (1) that the debtor had no equity in the farm; (2) that the debtor's petition was not filed in a good faith, bona fide effort at composition; and (3) that the debtor's financial condition was beyond hope of rehabilitation.

SIXTH GROUND.

The court erred in reversing this case, because the District Court found that the debtor had no equity in the farm, that his petition was not filed in good faith, and that there was no reasonable hope of his financial rehabilitation, and those findings are not questioned, criticised, or rejected by this court, by reason whereof this court has erroneously failed to give effect to the fact findings of the District Court which are amply supported by evidence in the record.

STATEMENT.

See the findings of the District Court, pages 99-108, Transcript of Record.

WHEREFORE, appellee, John Hancock Mutual Life Insurance Company, prays that this its petition for rehearing be granted and, upon such rehearing, that the court set aside its decision and judgment heretofore rendered herein on December 22, 1938, and that the judgment of the District Court, dismissing the debtor's petition and all proceedings thereunder, be in all things sustained and affirmed.

Respectfully submitted,

L. M. BICKETT,

San Antonio, Texas,

Attorney for Appellee, John Hancock Mutual Life Insurance Company.

I, L. M. BICKETT, do certify that I have read the foregoing petition for rehearing; that to the best of my knowledge, information, and belief there is good ground to support said petition; and that it is not interposed for delay.

Witness my personal signature this 6th day of January, A. D., 1939.

.....

Attorney of record for appellee, John Hancock Mutual Life Insurance Company.

The attorney of record for appellant in this cause is T. E. Mosheim, Esquire, of Seguin, Texas, to whom a copy of this petition for rehearing has been furnished.

[fol. 137] DISSENTING OPINION OF HONORABLE EDWIN R. HOLMES, CIRCUIT JUDGE, TO DENIAL OF PETITION FOR REHEARING—Filed January 23, 1939

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8868

BENNO BARTELS, Appellant,

versus

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

(January 23, 1939)

Before Sibley, Hutcheson and Holmes, Circuit Judges

BY THE COURT:

It is Ordered that the petition for rehearing in the above numbered and entitled cause be, and it is hereby,

Denied.

Holmes, Circuit Judge, dissents.

HOLMES, Circuit Judge, dissenting:

I think the petition should be granted. The point of dis-[fol. 138] agreement between us is not whether appellant is entitled to be adjudged a bankrupt. That was decided in Baxter v. Savings Bank of Utica, 92 F. (2d) 404, which apparently is approved by three of the five judges of this circuit, and which is in accord with Massey v. Farmers & Merchants National Bank & Trust Company, 94 F. (2d) 526, wherein certiorari was applied for by eminent counsel, and the application was afterward withdrawn prior to a ruling thereon by the Supreme Court. 303 U. S. 665.

The real question at issue in this case is whether appellant is entitled to petition the court to allow him to retain possession of his property for a period of three years, during which

it shall stay all judicial proceedings in any court, or under the direction of any official, against the debtor or any of his property; and whether he is entitled to invoke the other jurisdictional provisions of Section 75(s) of the Bankruptcy Act.

No one denies that a farmer may become a voluntary bankrupt or that he may not be forced to become an involuntary one. Appellant has not petitioned for an adjudication as an ordinary bankrupt. There is nothing in the evidence to indicate that he desires any status in the bankruptcy court except that provided by subsection (s). If he does, no one may object, but he should not be entrapped, when he is seeking special relief under emergency legislation. This was the effect of our holding in the Baxter case, in which no application for certiorari was made.

The question is, shall a debtor who prays for the beneficent provisions of subsection (s) be dealt with, under Section 22 of the Act, as an ordinary voluntary bankrupt? The majority opinion says: "If there is no substantial equity, actual or potential, above the mortgage debt reasonably to be saved, a sale of the farm may be ordered, defeating of course rehabilitation, but the adjudication would [fol. 139] stand and administration in bankruptcy continue"; but it does not say whether the administration should continue under subsection (s) or as in ordinary bankruptcy. The distinction is important, as will appear from the legal requirements of administration.

It is fundamental that adjudication fixes the status both of the bankrupt and of his property as of the date when the petition for adjudication was filed. An ordinary adjudication divests rights of the bankrupt and fixes rights of creditors, but under subsection (s), it leaves the substantive rights of bankrupt and creditors unimpaired, and provides a procedure for the enforcement of both. The distinction between the latter procedure and that in ordinary bankruptcy is, from the debtor's point of view, very marked. When the petition is not filed in good faith, fairness, as well as the statute, requires the proceedings to be dismissed, rather than to hold the petitioner as an ordinary bankrupt, and, denying a stay, to sell his property without any equity of redemption. Sheets v. Livy, 99 F. (2d) 917.

Recurring to the real question at issue, the majority opinion says that Section 75 nowhere mentions initial good faith as a prerequisite to invoking subsection (s). As to

this, the note to Wright v. Vinton Branch, 300 U. S. at page 462, seems to me to be ample authority. It elaborates upon the construction of the act in the body of the opinion. Apparently the note has the full sanction of the court, and, in addition to what I have previously quoted, it says: "It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition in the outset." That is, he could not have filed his original petition, amended under subsection (s).

The holding which seems to me to be clearly untenable is that an amendment, not of the averments but of the [fol. 140] prayer of the petition, supplies a constituent element essential to confer the additional jurisdiction for relief of debtors which was the primary object of the original petition. Having made good faith essential to the filing of the original petition, it was unnecessary to repeat the requirement in the provision for the amendment. Referring to the petition, an amendment of which is the subject of our disagreement, the statute provides as follows: "Upon the filing of such a petition or answer the judge shall enter an order approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it." 11 U. S. C. A. 202(a).

The above quoted sentence is from section 74(a), which applies to any person, except a corporation, seeking a composition or extension of his debts. Appellant is a person and not a corporation; therefore, it includes him; but he belongs to a particular class of persons, which is further dealt with in section 75. He is a farmer, and when the latter seeks a composition or extension of his debts, additional jurisdiction is conferred on the bankruptcy court, but the general requirement that the petition must be filed in good faith is not relaxed. This is put beyond doubt by subsection (i) which provides: "The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In applications for extensions the court shall require proof from each creditor filing a claim that such claim

is free from usury as defined by the laws of the place where the debt is contracted."

[fol. 141] When these statutory provisions are rounded out by the constitutional construction of section 75(s) in Wright v. Vinton Branch, supra, and particularly by note 6 to the opinion of the court in that case, the court below was fully warranted in its dismissal of the proceeding, because there was no hope of rehabilitation and the amended petition was not filed in good faith.

Merely as a person, a farmer may file a petition under section 74, seeking a composition or extension of his debts; he may amend it by alleging that he is a farmer and bring the proceeding within the additional jurisdiction granted under section 75; and, failing to reach an agreement with his creditors, he may amend the prayer of his petition and ask to be adjudged a bankrupt under section 75(s), wherein still further powers are given to the bankruptcy court. The statute declares that these are grants of jurisdiction in addition to those theretofore possessed by the bankruptcy courts. 11 U. S. C. A. 201 (Section 73). The judicial power of the United States having the capacity to receive this jurisdiction from the Congress, the bankruptcy courts may exercise it if a person of the class designated seeks to invoke it by proper petition filed in good faith.

No good faith is required in ordinary bankruptcy; the debtor's unexempt property is vested in a trustee for the benefit of his creditors; he is discharged from his provable debts; and nothing further is expected of him with respect to his former indebtedness; but sections 74 and 75 are intended to compose the debts and rehabilitate the debtor, either with or without an adjudication. In the latter instance, in the absence of good faith or the hope of rehabilitation, the proceeding is futile, and the law will not do an idle thing, especially since it will not help the debtor, and will hinder or delay the creditors. Sections 73, 74, and [fol. 142] 75 are in one act, were passed at the same time (47 Stat. 1467), and should be construed together as the Congress was dealing with the whole subject at the same time, as indicated in 75(r) which includes section 74 in its definition of a farmer.

The status of the debtor is not changed upon the amendment of his petition and his adjudication in bankruptcy under section 75(s). This is shown by section 75(n), which provides that upon the filing of the petition the debtor-

farmer subjects himself and his property to the exclusive jurisdiction of the court, and that such jurisdiction shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed. Therefore, the filing of the amended petition asking to be adjudged a bankrupt did not take away the power of the court to dismiss the petition (if not filed in good faith) expressly granted under section 74(a) and impliedly brought forward into section 75 by paragraph (i) of the latter section.

Notice to creditors is not necessary before dismissal of the original or amended petition. The statute does not require it, because the jurisdiction being exercised is primarily for the relief of debtors. Herein is another difference between the two procedures. The procedure in ordinary bankruptcy, where the rights of creditors are considered first, is incompatible in many respects with the beneficent procedure in recent legislation accorded distressed debtors. The basis for a contrary view may be found in the contention that, while the court might have dismissed the original petition herein without notice to creditors, it did not do so, but approved the same, and that the order of approval is res judicata. This contention readily gives way upon examination. First, the approval was upon the ex parte application of appellant, who did [fol. 143] not file the petition or amendment thereto in good faith and may not complain of its dismissal. Second, no one was prejudiced by the dismissal, not even appellant, because, in the absence of good faith or hope of rehabilitation, he is not entitled to a stay, or to retention of possession of his property after adjudication, or to an equity of redemption after a sale thereof, or to the other benefits of the liberal legislation intended for the relief of debtors in an economic emergency. Third, the bankruptcy court is always open; it has no terms fixed by law, and may review an order of this kind at any time before the proceeding is finally closed.

We have seen that every individual seeking a composition with creditors must file a petition in good faith or the court has power to dismiss it, and should do so under section 74 (a), without notice to creditors. What reason can be urged for exempting a farmer from this requirement? Upon what principle of justice should a farmer

who has no hope of rehabilitation be permitted to delay or hinder creditors with a sham proceeding for composition or extension of his debts? Good faith and hope of rehabilitation are not unusual requirements, and it is inconceivable that the Congress intended a discrimination in this respect when it was dealing with farmers and other individuals at the same time and in the same act: H. R. No. 14,359, for the relief of debtors. 47 Stat. 1467. Therefore, the only reasonable construction of the act is that a farmer is a person entitled to file a petition under either section 74 or 75; and a petition under either section may be dismissed for lack of good faith. This view is confirmed by subsection (i) of section 75, which requires confirmation of the proposal by the court if "the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden." This statute itself is enough to show the intent of Congress, even if a farmer is not a person [fol. 144] entitled to file a petition under section 74 (a) which may be dismissed by the court, for want of good faith, without notice to creditors.

Since the appellant has given no indication of a desire to become an ordinary bankrupt, and since the ruling of the majority is that neither good faith nor hope of rehabilitation is essential to an adjudication upon the amended petition, which entitles him to invoke the court's emergency jurisdiction intended especially for the relief of debtors, I dissent, with deference, from the order overruling the petition for a rehearing.

[fol. 145] ORDER DENYING REHEARING

Extract from the Minutes of January 23, 1939

No. 8868

BENNO BARTELS

versus

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Holmes, Circuit Judge, dissents."

[fol. 146] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 118 to 145 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8868, wherein Benno Bartels is appellant and John Hancock Mutual Life Insurance Company, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 117 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 23rd day of March, A. D. 1939.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 24, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court U. S.
FILED
APR 13 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. [redacted] 33

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

BENNO BARTELS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

L. M. BICKETT,
JOHN H. BICKETT, JR.,
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Boston, Massachusetts,
Of Counsel.

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STATUTE CITED.

Subsection (s), Section 75, Bankruptcy Act, Title 11, U. S. C. A., Sec. 203 (s), Appendix "A", 1, 6, 7, 8, 10, 11, 12, 15, 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 867

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

BENNO BARTELS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable The Chief Justice and Associate Justices of The Supreme Court of the United States:

Summary Statement of Matter Involved.

This case concerns the proper construction and application of Subsection (s) of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s), relating to agricultural compositions and extensions.[1]

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[1] Printed in the appendix hereto as Appendix "A".

Upon the motion of petitioner, John Hancock Mutual Life Insurance Company, a lien creditor, the District Court dismissed the petition for composition and extension of Benno Bartels, the debtor. As a basis for the decree or order of dismissal, the District Court, after a full hearing, found: (1) that the debtor had no equity in his farm, which constituted the principal asset of his estate, and upon which the lien creditor held a mortgage; (2) that the debtor offered no definite or feasible plan for a composition and extension of his debts; (3) that there was no reasonable hope of the debtor's financial rehabilitation out of the property involved in the estate; and (4) that the debtor's petition was not filed in good faith in a bona fide attempt to effect a composition and extension of his debts (R. 106-109).

On the debtor's appeal from the order of the District Court dismissing the petition and all proceedings thereunder, the Circuit Court of Appeals for the Fifth Circuit, by a divided court, reversed the judgment and decree of the District Court.

The majority opinion of the Circuit Court of Appeals in this case, written by Circuit Judge Sibley and concurred in by Circuit Judge Hutcheson, a copy of which is appended to this petition (Appendix "B"), while not questioning the fact findings of the District Court, nevertheless, holds that the District Court was without the power to dismiss the debtor's petition and proceedings thereunder. In a dissenting opinion in this case, a copy of which is appended to this petition (Appendix "C"), Circuit Judge Holmes, expressing the view that the judgment and decree of the District Court should be affirmed, said, in part:

> "In sustaining the constitutionality of the act, the Supreme Court held that the proceeding could be maintained only as a *bona fide* effort on the part of the debtor to rehabilitate himself, and that this was

without regard to any provision of the act specifically requiring good faith. In a footnote to its opinion, it says: 'Relief under Sec. 75 (s) may be obtained only by one who has made a *bona fide* attempt, and has failed, to effect a composition under Sec. 75 (a) (r).' *Wright* v. *Vinton Branch*, 300 U. S. 440, 462. It further states that the proceedings will be halted at the outset if the debtor is beyond hope of rehabilitation. Such a pronouncement, when made the basis of a holding that an enforced delay in favor of one class of litigants for a period of three years does not violate the due-process clause of the Constitution, should not be disregarded."

* * * * * * *

"The decision of this case is unfortunate in view of our decision in *John Beverly Henderson, Debtor*, No. 8758, (100 F. (2d) 820), this day decided. The two cases were submitted at the same term of court and were considered together; but, owing to the fact that exactly the same judges did not sit in both cases, a different result is reached."

Thereafter, on petition for rehearing filed in the Circuit Court of Appeals, the majority of the court, composed of Circuit Judges Sibley and Hutcheson, adhered to its original opinion and denied a rehearing. And, upon the petition for rehearing, Circuit Judge Holmes, in a second dissenting opinion, a copy of which is appended to this petition (Appendix "D"), said in part:

"Recurring to the real question at issue, the majority opinion says that Section 75 nowhere mentions initial good faith as a prerequisite to invoking subsection (s). As to this, the note to *Wright* v. *Vinton Branch*, 300 U. S. at page 462, seems to me to be ample authority. It elaborates upon the construction of the act in the body of the opinion. Apparently the note has the full sanction of the court, and, in addition to what I have previously quoted, it says: 'It must be assumed

that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition in the outset.' That is, he could not have filed his original petition, amended under subsection (s)."

On the same day on which the Circuit Court of Appeals for the Fifth Circuit, by the majority opinion; reversed this case and held that the District Court was in error in dismissing the debtor's petition and all proceedings thereunder, the same court, in an opinion by Circuit Judge Holmes, concurred in by Circuit Judge McCord, then constituting the majority of the court, reached a different result and rendered a contrary opinion in the case of *John Beverly Henderson, Debtor,* (100 F. (2d) 820). In the *John Beverly Henderson* case, Circuit Judge Hutcheson dissented for the reasons given in the majority opinion in the *Bartels* case that day decided. Copies of the majority and dissenting opinions in the *John Beverly Henderson* case are appended to this petition. (Appendices "E" and "F"). Thus, owing to the fact that exactly the same judges did not sit in this, the *Bartels* case, and in the *Henderson* case, both of which were decided by the Circuit Court of Appeals for the Fifth Circuit on the same day, different results and judgments were reached in the two cases.

Thereafter, on March 16, 1939, the Circuit Court of Appeals for the Fifth Circuit, in the case of *Wilson, Administrator,* v. *Alliance Life Insurance Company,* (not yet officially reported), before Circuit Judges Sibley, Holmes, and McCord, in an opinion by Circuit Judge Holmes, then of the majority, affirmed the judgment of the District Court dismissing the debtor's petition and all proceedings thereunder. And, in that case, Circuit Judge Sibley, who had theretofore been of the majority in this, the *Bartels* case,

wrote a minority opinion adhering to the views originally expressed by him in this, the *Bartels* case. Copies of both of the opinions in *Wilson, Administrator*, v. *Alliance Life Insurance Company* are appended to this petition. (Appendices "G" and "H"). In *Wilson, Administrator*, v. *Alliance Life Insurance Company, supra*, Circuit Judge Holmes, speaking for the majority, said, in part:

> "Accepting the finding that the order was not made in good faith and that there is no reasonable hope of rehabilitation, as we must on this appeal, appellant's contention is reduced to the proposition that the district court was without authority to set aside the adjudication and dismiss the proceeding, but was bound to continue the stay provided for or to liquidate according to the procedure and subject to the limitations provided for in the act. Following what we conceive to be the correct interpretation of the case of *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, we have held that good faith and a reasonable hope of rehabilitation in the proceedings leading to, as well as in making, the offer of composition and extension under Section 75 of the act (11 U. S. C. A. 203 (a)-(r) are necessary prerequisites to the benefits provided under subsection (s) (11 U. S. C. A. 203 (s)). *Baxter* v. *Savings Bank of Utica, supra*, 92 F. (2d), 404, 406; *In re John Beverly Henderson*, 100 F. (2d) 820."

Thus, this is a petition for writ of certiorari to review a judgment and decree of the Circuit Court of Appeals for the Fifth Circuit, rendered by a divided court, in direct conflict with a decision (also, by a divided court), in a similar case decided by the same court on the same day, and, likewise, in direct conflict with a decision of the same court, rendered shortly thereafter in a similar case, where the conflicts in each of the three similar cases, as pointedly stated in the majority and dissenting opinions, copies of all

of which are appended to this petition, arise upon the interpretation, construction, and application of Subsection (s) of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s), as previously construed and interpreted by the Supreme Court of the United States in *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 57 S. Sup. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455. The conflicts are irreconcilable. In this, the *Bartels* case, the decision of the majority, *as then constituted*, is not in accord with the decision of the Supreme Court in *Wright* v. *Vinton Bank* (*supra*); in the two cases, of *John Beverly Henderson*, and *Wilson, Administrator*, v. *Alliance Life Insurance Company*, the decision of the majority, *as then constituted*, is in accord with the decision of the Supreme Court of the United States in *Wright* v. *Vinton Bank, supra*.

Statement Showing Basis of Jurisdiction.

Petitioner presents the following grounds as the basis upon which it is contended that the Supreme Court has jurisdiction to review the judgment of the Circuit Court of Appeals in this case:

1. The majority opinion and decision of the Circuit Court of Appeals in this case reflects a most unusual division of opinion and conflict among four judges of the Circuit Court of Appeals for the Fifth Circuit, as shown in the majority and dissenting opinions in this case and in other similar cases decided by that court at about the same time, namely: *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404, *In re John Beverly Henderson*, 100 F. (2d) 280, *Wilson, Administrator*, v. *Alliance Life Insurance Company*, decided on March 16, 1939 (not yet officially reported); and such division of opinion and conflict within the Circuit Court of Appeals for the Fifth Circuit calls for an exercise of the Supreme Court's power of supervision.

2. The majority opinion and decision of the Circuit Court of Appeals in this case is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 462, 81 L. Ed. 736, 743, 112 A. L. R. 1455.

3. The majority opinion and decision of the Circuit Court of Appeals in this case is in direct conflict with the decisions of other Circuit Courts of Appeal, upon the same questions involved in this case, in the following cases, among others, namely:

In re Borgelt (Seventh Circuit), 79 F. (2d) 929.

Helbstab v. *Equitable Life Assur. Soc.* (Tenth Circuit), 91 F. (2d) 655, 659.

Pearce v. *Coller* (Third Circuit), 92 F. (2d) 237 (certiorari denied).

In re Coleman (Sixth Circuit), 93 F. (2d) 1001, C. C. A. (1938).

Massey v. *Farmers & Merchants Bank* (Fourth Circuit), 94 F. (2d) 526 (1938).

4. The majority opinion and decision of the Circuit Court of Appeals in this case has misconstrued and misapplied a Federal statute, to wit: Section 75 (s) of the Bankruptcy Act as amended (11 U. S. C. A., Sec. 203 (s)).

5. The petitioner, by the construction and application given by the majority opinion and decision of the Circuit Court of Appeals in this case to Section 75 (s) of the Bankruptcy Act, as amended, has been deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

6. The Circuit Court of Appeals, by the majority opinion and decision in this case, has erroneously failed to give effect to fact findings of the District Court, which are not questioned, criticized, or rejected by the Circuit Court of

Appeals, and which are amply supported by evidence in the record.

The Questions Presented.

In the interest of brevity (Rule 38, paragraph 2), petitioner does not at this time set forth all of the points which will be urged at the argument on the merits of this cause, should the writ be granted, nor all of the contentions in support of such points. But, in order to comply with the rule of this Court requiring that all issues upon which decision is requested be presented in the petition for certiorari, petitioner here refers to and incorporates into this petition all of the questions raised and the matters presented in its brief and in its petition for rehearing filed in the Circuit Court of Appeals, with the same force and effect as if herein set out in full.

The petitioner represents that the principal question involved in this case and presented by this petition for writ of certiorari is as follows:

Where, under the accepted findings of the District Court, the debtor had no equity in his farm, the debtor offered no feasible plan of composition and extension, there was no hope of the debtor's financial rehabilitation, and the debtor's petition was not filed in good faith, was the District Court authorized to dismiss the debtor's petition and proceedings under Subsection (s), of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Sec. 203 (s)?

Reasons Relied upon for the Allowance of the Writ.

This case presents questions of great importance. It requires, petitioner submits, the allowance of a writ of certiorari for the following reasons:

First.

The writ of certiorari should be allowed in this case, because, as petitioner represents with great deference and

respect, there exists between the decision of the Circuit Court of Appeals for the Fifth Circuit in this, the *Bartels* case, in the decision by the same court in the *John Beverly Henderson* case decided on the same day, in the decision by the same court in *Wilson, Administrator,* v. *Alliance Life Insurance Company,* decided on March 16, 1939, and in a prior decision by the same court in *Baxter* v. *Savings Bank of Utica,* 92 F. (2d) 404, a most unusual and unseemly conflict of opinion among four judges of that court, namely, Circuit Judges Sibley, Holmes, Hutcheson, and McCord. Copies of the majority and dissenting opinions in this, the *Bartels* case, in the *John Beverly Henderson* case, and in the case of *Wilson, Administrator,* v. *Alliance Life Insurance Company,* appended to this petition, and a reference to the *Baxter* case, *supra,* illustrate the existing contrariety of opinion existing among those four eminent circuit judges. The majority and dissenting opinions in these cases demonstrate, far better than any elaboration which petitioner might here make, the unfortunate conflict of opinion existing in the Circuit Court of Appeals for the Fifth Circuit. With the utmost respect, it is not inaccurate for petitioner to say that an affirmation or a reversal of this, the *Bartels* case, and of other similar cases involving identical questions, is made to turn and depend upon the circumstance as to how the membership of the court of three judges may be constituted with respect to the majority or the minority view. That is, the opinions in the cases mentioned demonstrate, without need of further statement here, that, among the four circuit judges mentioned, there is an equal division of opinion as concerns a correct decision of the questions involved in this the *Bartels* case, in that two of the circuit judges entertained the opinion that the judgment of the trial court should be affirmed, while the other two of the circuit judges entertained the opinion that the decision of the trial court should be reversed.

Second.

The writ of certiorari should be allowed in this case, because the decision of the Circuit Court of Appeals in this case is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 462, 57 Sup. Ct. 556, 81 L. Ed. 736-745, 112 A. L. R. 1455, wherein the Supreme Court of the United States has distinctly held: (1) that "Relief under Section 75 (s) (Bankruptcy Act as amended, 11 U. S. C. A.), Sec. 203 (s), may be obtained only by one who has made a *bona fide* attempt, and has failed, to effect a composition under Section 75 (a)-(r) (Bankruptcy Act as amended); (2) that a debtor's proceeding under Section 75 of the Bankruptcy Act "will be halted at the outset" if the debtor is beyond all reasonable hope of financial rehabilitation; and (3) that, without regard to any provision of the Act (Section 75 of the Bankruptcy Act, 11 U. S. C. A.), or any specific requirement that the debtor's petition be made in good faith, nevertheless, good faith on the part of the petitioning debtor is required.

The majority opinion of the Circuit Court of Appeals in this, the *Bartels* case, holds that the language of Justice Brandeis of the Supreme Court of the United States, appearing in the footnote to the opinion of the Court, delivered in the case of *Wright* v. *Vinton Branch Bank, supra*, constitutes no part of the opinion of the Supreme Court in that case, and, thereupon, the majority of the Circuit Court of Appeals declines to follow such language. In the dissenting opinion of Circuit Judge Holmes in this case, it is recognized that the language in the footnote of Justice Brandeis in *Wright* v. *Vinton Branch Bank, supra*, does constitute a controlling part of the opinion of the Supreme Court in that case. The majority opinion in this case is, therefore, directly in conflict with the holding of the Su-

preme Court of the United States in the case of *Wright* v. *Vinton Branch Bank, supra,* in the three respects pointed out.

Third.

The writ of certiorari should be allowed in this case, because the decision of the Circuit Court of Appeals in this case is in direct conflict with the decision of other Circuit Courts of Appeals, namely: *In re Borgelt* (Seventh Circuit), 79 F. (2d) 929; *Helbstab* v. *Equitable Life Assur. Soc.* (Tenth Circuit), 91 F. (2d) 655-659; *Pearce* v. *Coller* (Third Circuit), 92 F. (2d) 237 (certiorari denied); *In re Coleman,* 93 F. (2d) 1001 (C. C. A.) (1938); *Massey* v. *Farmers & Merchants Bank* (Fourth Circuit), 94 F. (2d) 526 (1938). It is distinctly held in these five cases, decided by other Circuit Courts of Appeals, that a debtor's petition for composition and extension under Subsections (a)-(r), of Section 75 of the Bankruptcy Act, must, in the first instance, be filed in good faith in *a bona fide* effort to obtain a composition and extension, that some feasible plan of composition and extension must be offered by the debtor to his creditors, that the debtor must have an equity in the estate over and above his lien debts, and that there must be a reasonable hope of financial rehabilitation for the debtor. These elements being absent, it is held in the foregoing cases decided by other Circuit Courts of Appeals that the debtor's petition and all proceedings thereunder should be dismissed.

Fourth.

The writ of certiorari should be allowed in this case, because the decision of the Circuit Court of Appeals in this case, by the majority opinion, has misconstrued and misapplied Section 75 (s) of the Bankruptcy Act, as amended (11 U. S. C. A., Sec. 203 (s)), in that the court's construc-

tion, interpretation, and application of the statute is in direct conflict with a prior construction, interpretation, and application of said statute, as made by the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S., 440-462, 57 Sup. Ct. 556, 81 L. Ed. 736, 743, 112 A. L. R. 1455.

Fifth.

The writ of certiorari should be allowed in this case, because the Circuit Court of Appeals in this case, by the majority opinion, has misconstrued, misinterpreted, and misapplied Section 75 (s) of the Bankruptcy Act, as amended (11 U. S. C. A., 205 (s)), so as to deny to this petitioner, John Hancock Mutual Life Insurance Company, due process of law and to deprive it of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, in that petitioner will be postponed and delayed, to its great detriment and loss, in the collection and enforcement of its debt and lien where, according to the accepted findings of the trial court, the debtor had no equity in his farm, the debtor proposed no feasible plan for composition and extension, there was no reasonable hope of the debtor's financial rehabilitation, and the debtor's petition was not filed in good faith in a *bona fide* effort to obtain a composition and extension of his debts.

Sixth.

The writ of certiorari should be allowed in this case, because the decision of the Circuit Court of Appeals in this case, by the majority opinion, has erroneously failed to give effect to the accepted fact findings of the District Court, which are amply supported by evidence in the record, namely: (1) that the debtor had no equity in his farm, which constituted the principal asset of his estate,

and upon which the lien creditor held a mortgage; (2) that the debtor offered no definite or feasible plan for a composition and extension of his debts; (3) that there was no reasonable hope of the debtor's financial rehabilitation out of the property involved in the estate; and, (4) that the debtor's petition was not filed in good faith in a *bona fide* attempt to effect a composition and extension of his debts.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; that the decree of the United States Circuit Court of Appeals for the Fifth Circuit, whereby the judgment of the District Court was reversed, be reversed by this Honorable Court; that the judgment and decree of the District Court be in all things affirmed; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

L. M. BICKETT,
JOHN H. BICKETT, JR.,
Counsel for Petitioner,
San Antonio, Texas.

BYRON K. ELLIOTT,
Boston, Massachusetts,
Of Counsel.

I, John H. Bickett, Jr., do hereby certify that I have examined the foregoing petition for writ of certiorari,

and that, in my opinion, the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one, and is such, that the prayer of the petition should be granted by this Honorable Court.

JOHN H. BICKETT, JR.

Subscribed and sworn to before me this 22nd day of March, A. D. 1939.

MRS. ANNA BELLE FRITCH,
[SEAL.] *Notary Public, Dallas County, Texas.*

BRIEF OF ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Reference is here made to the summary statement of matter involved, contained in the foregoing petition for writ of certiorari, as a sufficient preliminary statement of the nature of this case (Petition, pp. 1-6).

Specification of Errors.

The errors in the judgment of the Circuit Court of Appeals for the Fifth Circuit in this case may be appropriately combined into one comprehensive specification of error, which petitioner submits in this brief in support of its petition for writ of certiorari, as follows:

The decision and judgment of the Circuit Court of Appeals in this case, whereby the judgment of the District Court, dismissing the debtor's petition and all proceedings thereunder, was reversed and the case was ordered re-instated for further proceedings, is erroneous, because such decision and judgment is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 462, 57 Sup. Ct. 556, 81 L. Ed. 736, 743, 112 A. L. R. 1455, wherein the Supreme Court has distinctly held: (1) that "Relief under Section 75 (s) (Bankruptcy Act as amended, 11 U. S. C. A., Sec. 203 (s)), may be obtained only by one who has made a *bona fide* attempt, and has failed, to effect a composition under Section 75 (a)-(r) (Bankruptcy Act as amended)"; (2) that a debtor's proceeding under Section 75 of the Bankruptcy Act "will be halted at the outset" if the debtor is beyond all reasonable hope of financial rehabilitation;

and (3) that, without regard to any provision of the Act (Section 75 of the Bankruptcy Act, 11 U. S. C. A.), or any specific requirement that the debtor's petition be made in good faith, nevertheless, good faith on the part of the petitioning debtor is required.

Statement and Argument.

The findings of the District Court, referred to in the petition for writ of certiorari, as the basis for the decree of dismissal, are not questioned in either the majority opinion or in the two dissenting opinions in this case.

The District Court, in findings which appear in the transcript of the record, said:

> "The Court fully realizes that it ought not to apply emergency prices to a matter of this kind or foreclose the possibility of rehabilitation on the theory that immediate liquidation could not be had. However, there is nothing here to indicate to the Court that there is any reasonable probability of this property being sold for enough to give any substantial equity at all to the debtor. The charges are mounting rapidly and any equity that may exist will be wiped out" (R. 107).

The farm owned by the debtor, Bartels, on which John Hancock Mutual Life Insurance Company held a first and superior lien, contained one hundred acres of land situated in Guadalupe County, Texas, with improvements thereon. The lien indebtedness calculated up to March 23, 1938, amounted to $8,195.37 (R. 8-9). For the purpose of making a loan on the land, the Federal Land Bank fixed the loan value at $54.00 per acre, and the sum of $5,400.00 was the highest amount that the Federal Land Bank would lend on the land (R. 29). A disinterested witness, Wm. F. Schutz, a real estate man who has dealt extensively in farms and real estate, testified: that the debtor's farm land was worth $40.00 per acre, and the improvements were

worth $2,000.00, making a total valuation of $6,000.00—an amount considerably less than the existing lien debt held by John Hancock Mutual Life Insurance Company (R. 94).

The record further shows that from fifteen to twenty-five acres of the debtor's farm is subject to overflow from a creek or a "draw." The total amount of the cultivated land on the place was 85 acres (R. 30).

It was shown that, within the last three or four years, the debtor has realized as revenue from the farm about $300.00 or $400.00 a year, whereas, annual interest alone on the lien debt amounted to $390.00 (R. 8-24).

The District Court found that the debtor, Bartels, had no definite plan or proposal to make to his creditors for a composition and extension of his debts; and, in that connection, the court quoted the following questions and answers from the record:

> "Q. Do you have any plan or proposal to submit to your creditors, Mr. Bartels, as a composition or extension of your debts in these proceedings?"
>
> "A. No. I want to pay everybody that I owe, sure."
>
> "Q. You don't have any definite, concrete plan now, do you?"
>
> "A. No, not exactly, but I want to pay everybody I owe."
>
> "Q. How are you going to raise the money to farm the land this coming year? Can you tell us how you are going to raise the money to farm it?"
>
> "A. I will just have to get out and make a little" (R. 102).

The District Court, also, found that there was no reasonable hope of the debtor's rehabilitation; and, in such finding, the court used the following language:

> "Accordingly, the court finds that there is no reasonable probability of the financial rehabilitation of this debtor" (R. 107).

The debtor, Bartels, owned the one hundred acre farm on which the petitioner, John Hancock Mutual Life Insurance Company, holds a first lien securing an indebtedness now aggregating approximately $9,000.00; and he owned two vacant lots, purchased some twenty years ago, situated in the Mexican section of San Antonio, which lots he had never seen and for which lots he had been unable to obtain any purchase offer. He owned one horse and one milk cow. He owned a tractor which was mortgaged for $500.00 and on which a $250.00 installment payment was past due. He owned an undivided interest in a small stock of groceries of the estimated value of $250.00, which interest he had contracted to sell but has not yet sold. He had no money on hand; and he knew of no place where he could borrow any money. In addition to his lien indebtedness on the farm, he owed unsecured debts aggregating $2,100.00, and those debts were past due. His testimony showed that, over a period of several years, he had been unable to produce from the farm enough revenue to pay interest and taxes thereon, not taking into account his living expenses (R. 16-19).

In this connection, the District Court said:

> "It is purely speculative as to what can be made on this farm, and we have no better light by which we can guide our feet than the lamp of experience. For a number of years, this farm has not paid any such fanciful returns as some of the witnesses seem to think it should; it has been shown that within the last three or four years, he has not realized more than $300.00 or $400.00 from it. Of course, it has been testified that was because he did not farm it personally; that he has been in bad health. We have no assurance here that conditions in the future will be better than in the past. Assuming that he did make $300.00 to $400.00 from the farm, it would take that much to pay the current interest without making any payments on past due interest. Then we have the matter of operating expenses, living expenses and taxes to be considered" (R. 106-107).

In the case of *Wright* v. *Mountain Trust Bank, supra,* Justice Brandeis, speaking for the Supreme Court of the United States, said:

> "It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition at the outset."

Now, in this case, it was amply shown by the record of the proceedings at the first meeting of creditors before the Conciliation Commissioner, and, again, demonstrated in the full hearing before the District Court, that the debtor's financial condition generally was such that there could be no reasonable hope or expectation for his rehabilitation. Indeed, the record shows that this man's financial affairs could not be worked out; that his debts and liabilities far exceeded his assets; and that he was utterly and hopelessly insolvent. In such a situation, delay and postponement in the matter of permitting the creditor to foreclose its lien could only result in loss and detriment to the creditor, with no resulting benefit to the debtor. As well said by the District Court:

> "The debtor's situation was such that there was no reason to believe that he could be rehabilitated, and the bringing of the matter here was simply to postpone the evil day and increase the amount of his indebtedness without accomplishing any good to himself or to his creditors" (R. 99).

Conclusion.

Accordingly, it is the contention of petitioner that the District Court rendered the correct judgment and decree in this case in dismissing the debtor's petition and all proceedings thereunder, that the judgment and decision of the Circuit Court of Appeals for the Fifth Circuit, reversing the judgment and decree of the District Court, is erroneous

for the reasons pointed out in the foregoing brief, and that, for each and all of the reasons set forth in the foregoing petition for writ of certiorari, this Honorable Court should allow the writ of certiorari in this case.

WHEREFORE petitioner prays that its petition for writ of certiorari be allowed by this Honorable Court.

Respectfully submitted,

L. M. BICKETT,
JOHN H. BICKETT, JR.,
Counsel for Petitioner,
San Antonio, Texas.

BYRON K. ELLIOTT,
Boston, Massachusetts,
Of Counsel.

APPENDIX TO PETITION FOR CERTIORARI.

Appendix "A".

Sub-Section(s), Section 75 of the Bankruptcy Act as Amended, (Title 11, U. S. C. A., Section 203(s)).

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall re-

main in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this title, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.

(4) The conciliation commissioner, appointed under subsection (a) of this section, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of this subsection, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of admin-

istration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under this subsection, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under this section shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this title. The provisions of this title shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

(5) This title shall be held to apply to all existing cases now pending in any Federal court, under this title, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under this title may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this title shall not be grounds for denying him the benefits of this section.

(6) This title is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate. (July 1, 1898, c. 541, Sec. 75; Mar. 3, 1933, c. 204, Sec. 1, 47 Stat. 1470; June 7, 1934, c. 424, Secs. 8, 9, 48 Stat. 925; June 28, 1934, c. 869, 48 Stat. 1289; May 15, 1935, c. 114, Sec. 3, 49 Stat. 246; Aug. 28, 1935, c. 792, Secs. 1-6, 49 Stat. 942-945.)

Appendix "B".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8868.

BENNO BARTELS, *Appellant*,

versus

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., *Appellees.*

Appeal from the District Court of the United States for the Western District of Texas.

(December 22, 1938.)

Before Sibley, Hutcheson and Holmes, Circuit Judges.

SIBLEY, *Circuit Judge:*

The case concerns the proper application of Subsection (s) of Sect. 75 of the Bankruptcy Act, 11 U. S. C. A. Sect. 203(s). Benno Bartels as a farmer applied for a composition and extension of his debts and his petition was approved and referred to the Conciliator. At the creditors' meeting Bartels expressed a willingness to pay in full if given time, and proposed to work his farm himself and to apply the proceeds of the crops to his debts, selling and paying over at once property not needed on the farm. Theretofore he had let it out on shares because he had hurt his back, and poor crops had been made. He came to an agreement with his unsecured creditors but John Hancock Mutual Life Insurance Company held a mortgage on the farm for $6,000 principal, interest on which was three years in arrears, and this debt was a majority in amount of all his debts. This creditor required present payment of all arrearages, and since Bartels could not arrange cash therefor he could make no acceptable proposal. He then amended his petition and prayed to be adjudged a bankrupt under Subsection (s). On Jany. 10, 1938, he was so

adjudged and the case re-referred to the Conciliator as referee. Bartels appears to have continued in possession of the farm, but under what terms does not appear. About ten weeks later the Insurance Company moved, not to have its security sold, but that the adjudication in bankruptcy be set aside and all proceedings dismissed. The bankrupt resisted this. On a hearing the judge held there was no reasonable probability of the mortgaged property being sold for enough to give the debtor any substantial equity, and that accordingly there was no reasonable probability of his financial rehabilitation. The motion was granted, the adjudication set aside and the cause dismissed, largely on the authority of our decision in *Baxter* v. *Savings Bank of Utica*, 92 Fed. (2) 404. Other decisions from the Circuit Court of Appeals cited to support the judgment are: *In re Borgelt*, 79 Fed. (2) 929, approving and affirming 10 Fed. Supp. 113; *Knotts* v. *First Carolinas Joint Stock Land Bank*, 86 Fed. (2) 551; and *Massey* v. *Farmers & Merchants Bank*, 94 Fed. (2) 526. Of these the first rested on two grounds, that the debtor had not made a good faith offer, and there were no assets to be administered. The second was really decided on the erroneous ground that Subsection (s) was unconstitutional. The third squarely took the position that Subsection (s) cannot be invoked unless the initial offer made to creditors has come up to certain rather vague standards which would show good faith.

Confusion has arisen, we think, touching the way in which Subsection (s) fits into the scheme of bankruptcy, as to when the stay provided therein may be denied, and how security holders are to have their rights preserved. Farmers were favored in the original Bankruptcy Act in that while they might voluntarily go into bankruptcy, they could not be forced in. This is continued in proceedings under Section 74(1) 11 U. S. C. A. Sect. 202(1). Section 75 deals only with farmers, and as stated at its end (Subsection (s) (6)) is emergency legislation, limited originally to five years, and not to be applied where the judge finds no emergency to exist locally. The emergency was the great economic depression which in 1933 had rendered farming unprofitable, and farm lands unsalable for their normal

value. To force the sale of farms under such circumstances would be a hardship on the farmer who on a basis of normal values was really solvent, and would cause those who were insolvent to lose their means of livelihood, and probably in great numbers go to swell the ranks of the unemployed and those needing public relief. The surplus value inherent in the farms would, after economic revival, accrue to speculative buyers, and aggravate the social evil of the rich becoming ever richer and the poor poorer. Creditors as a rule do not wish farms, and would under safe arrangements prefer to extend time or to compromise their debts, if it would enable their farmer debtor to continue in business and pay them. Section 75 is intended to serve all these interests while seeking mainly to help distressed farmers so far as that may rightly be done. Its benefits are expressly extended both to those who cannot meet their debts as they mature but are solvent in a bankruptcy sense, and to those who are insolvent. Subsection (c).

The applicant under Section 75 is at first not a bankrupt, but a debtor. The aid of the court is first extended to secure a voluntary adjustment with his creditors, both secured and unsecured, which will enable him to continue to farm, the will of a majority in number and amount controlling the minority. If this adjustment cannot be accomplished, the farmer may wholly drop the matter, or he may turn to Subsection (s) and "amend his petition, asking to be adjudged a bankrupt." When so adjudged he becomes a bankrupt under the bankruptcy law, required to surrender his property except exemptions, and entitled to ask a discharge from his debts. But Subsection (s) introduces for a farmer who timely invokes it very important changes in the applicable bankruptcy law. Instead of immediately surrendering his property, and especially his farm and equipment, he may retain them, or so much as he requests, for three years, paying a reasonable rent for them, and may even at the appraised value redeem them on terms fixed by the court, the redemption money then becoming part of the estate to be distributed in bankruptcy in place of the property itself. All this, as respects unsecured creditors, has been considered to be within the bankruptcy

power of the federal government. But secured creditors whose liens antedate the law have as to their security vested rights which must be effectuated. The present Subsection (s) has been construed as sufficiently flexible to care for them. *Wright* v. *Vinton Branch Bank*, 300 U. S. 440. A creditor with a mortgage on the farm may be able to force a sale which will defeat a rehabilitation of the farmer which might otherwise have been accomplished. And, although there be no secured debts, or they are not urgently pressed, rehabilitation may appear to be impracticable, or pending it the farmer may breach his obligations, and then ordinary bankruptcy procedure may be ordered to go forward as Subsection (s) (3) declares. In neither case under a proper construction of Section 75 is the entire proceeding to be dismissed. On the contrary, when the rehabilitation sought by Subsection (s) fails, the farmer is still a bankrupt, and his estate is to be administered and his debts discharged as in other cases of voluntary bankruptcy. "In proceedings under this Section (Section 75) except as otherwise provided therein, the jurisdiction and powers of the court, the title powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer, and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition asking to be adjudged a bankrupt was filed with the clerk. * * * " Subsection (n). Much more is the general bankruptcy law to be applied after an adjudication as a bankrupt has been actually made under Subsection (s). The only mention of dismissing the proceedings which we find is in Subsection (1), when a composition has been carried out, or optionally when an extension proposal has been confirmed.

The courts have spoken of a lack of "good faith" in invoking Section 75 as a cause for dismissing the whole proceeding, and some countenance has been given the idea in a foot-note to the opinion in the case of *Wright* v. *Vinton Bank, supra.* We do not understand it to be a part of the court's opinion. The note mistakenly states that good faith

is made a requirement of the initiation of a proceeding under Sect. 75. That requirement appears in Sect. 74(a). Section 75 nowhere mentions initial "good faith" as a prerequisite to invoking Subsection (s), or going through bankruptcy if rehabilitation under that Subsection fails. The good faith of the offer and acceptance is to be enquired into by the court before confirming a composition or extension accepted by the majority of creditors, Subsection (i), and that is the only mention of good faith in Sect. 75. If the farmer is desirous of continuing to farm and is willing to give his creditors their full rights in his property as the law fixes them hoping to obtain from them such extension or compromise as will enable him to work out, that we think is all the good faith necessary. That he has no equity in his property but is actually insolvent is no bar. The statute says so in Subsection (c). That his creditors refuse to compromise or give time so as to enable him to farm, merely gives him the right to proceed in bankruptcy under Subsection (s) and thus to try conclusions with the judge. That Bartels in this case had no plan to present to his creditors except to offer to go to work personally on the farm with his grown son, and apply presently to his secured debt what he could raise by selling some mercantile property and vacant lots, hoping to pay all in full finally, does not require the dismissal of his proceedings. His unsecured creditors were actually content to adopt the plan. The secured creditor whose debt was a majority in amount was not content. Bartels thereupon rightly asked adjudication as a bankrupt, invoking Subsection (s). His secured creditor had the right thereafter to ask the court for a sale or other disposition of the security, if the delay and rentals fixed under Subsection (s) would impair his vested rights. This he did not do. He had no right to set aside the adjudication and dismiss the proceeding. If there is no substantial equity, actual or potential, above the mortgage debt reasonably to be saved, a sale of the farm may be ordered, defeating of course rehabilitation, but the adjudication would stand and administration in bankruptcy continue. It was error in this case to set aside the adjudication and dismiss the proceedings.

What we said about Subsection (s) in *Dallas Land Bank* v. *Davis*, 83 Fed. (2) 322, we see no occasion to modify. In *Baxter* v. *Savings Bank of Utica*, 92 F. (2) 404, the disposition of the case was correct, but some of the language touching initial good faith as a prerequisite to invoking Subsection (s) and indicating that the adjudication under Subsection (s) should have been set aside to make way for another adjudication we now think was inaccurate. The adjudication under Subsection (s) is good if the farmer never makes any application to retain possession of his property and for its appraisal and a stay of all other proceedings. The language of the statute shows that such application is optional, and the option may be lost by failure to assert it at the times the statute names. "Such farmer may, at the same time, or at the time of the first hearing, petition the court that all his property • • • be appraised, etc." If no such petition is made, or if later the benefits of possession and stay are defeated, the adjudication stands as a voluntary adjudication in bankruptcy. Appropriate proceedings ought to follow.

The judgment rendered on the motion of the Insurance Company is reversed and the case ordered reinstated for further proceedings not inconsistent with this opinion.

Appendix "C".

HOLMES, *Circuit Judge*, dissenting:

The district court found that there was no reasonable hope of appellant rehabilitating himself with the property involved in this estate, and that the petition was not filed in good faith. The record amply supports this finding, and the majority opinion does not question it. Nevertheless, the majority opinion holds that the court was without power to dismiss the proceedings.

In sustaining the constitutionality of the act, the Supreme Court held that the proceeding could be maintained only as a bona fide effort on the part of the debtor to rehabilitate himself, and that this was without regard to any pro-

vision of the act specifically requiring good faith. In a foot-note to its opinion, it says: "Relief under Sec. 75 (S) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Sec. 75 (a) (r)". *Wright* v. *Vinton Branch*, 300 U. S. 440, 462. It further states that the proceedings will be halted at the outset if the debtor is beyond hope of rehabilitation. Such a pronouncement, when made the basis for a holding that an enforced delay in favor of one class of litigants for a period of three years does not violate the due-process clause of the Constitution, should not be disregarded.

Good faith has been defined as lack of pretense. A proceeding such as this, without hope of rehabilitation, is a mere pretense. The majority says that, because there is a field of judicial action within which the court may move and act, the power to withhold its process in aid of a pretense is denied to it, and that, as a mere ministerial functionary, it must proceed only upon such motions and petitions as are expressly provided for in the act. This is not within the usual concept of a judicial tribunal. The Supreme Court held otherwise, and pointed out that the practical administration of the section in the lower courts already gave ample evidence of substantial protection to creditors. For these reasons, I think the judgment of the district court should be affirmed.

The decision of this case is unfortunate in view of our decision in *John Beverly Henderson, Debtor*, No. 8758, this day decided. The two cases were submitted at the same term of court and were considered together; but, owing to the fact that exactly the same judges did not sit in both cases, a different result is reached.

Appendix "D".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8868

BENNO BARTELS, *Appellant*,

versus

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Western District of Texas.

(January 23, 1939.)

Before Sibley, Hutcheson and Holmes, Circuit Judges.

By the COURT:

It is Ordered that the petition for rehearing in the above numbered and entitled cause be, and it is hereby denied.

Holmes, Circuit Judge, dissents.

HOLMES, *Circuit Judge*, dissenting:

I think the petition should be granted. The point of disagreement between us is not whether appellant is entitled to be adjudged a bankrupt. That was decided in *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404, which apparently is approved by three of the five judges of this circuit, and which is in accord with *Massey* v. *Farmers & Merchants National Bank & Trust Company*, 94 F. (2d) 526, wherein certiorari was applied for by eminent counsel, and the application was afterward withdrawn prior to a ruling thereon by the Supreme Court. 303 U. S. 665.

The real question at issue in this case is whether appellant is entitled to petition the court to allow him to retain possession of his property for a period of three years, during which it shall stay all judicial proceedings in any

court, or under the direction of any official, against the debtor or any of his property; and whether he is entitled to invoke the other jurisdictional provisions of Section 75 (s) of the Bankruptcy Act.

No one denies that a farmer may become a voluntary bankrupt or that he may not be forced to become an involuntary one. Appellant has not petitioned for an adjudication as an ordinary bankrupt. There is nothing in the evidence to indicate that he desires any status in the bankruptcy court except that provided by subsection (s). If he does, no one may object, but he should not be entrapped, when he is seeking special relief under emergency legislation. This was the effect of our holding in the Baxter case, in which no application for certiorari was made.

The question is, shall a debtor who prays for the beneficent provisions of subsection (s) be dealt with, under Section 22 of the Act, as an ordinary voluntary bankrupt? The majority opinion says: "If there is no substantial equity, actual or potential, above the mortgage debt reasonably to be saved, a sale of the farm may be ordered, defeating of course rehabilitation, but the adjudication would stand and administration in bankruptcy continue"; but it does not say whether the administration should continue under subsection (s) or as in ordinary bankruptcy. The distinction is important, as will appear from the legal requirements of administration.

It is fundamental that adjudication fixes the status both of the bankrupt and of his property as of the date when the petition for adjudication was filed. An ordinary adjudication divests rights of the bankrupt and fixes rights of creditors, but under subsection (s), it leaves the substantive rights of bankrupt and creditors unimpaired, and provides a procedure for the enforcement of both. The distinction between the latter procedure and that in ordinary bankruptcy is, from the debtor's point of view, very marked. When the petition is not filed in good faith, fairness, as well as the statute, requires the proceedings to be dismissed, rather than to hold the petitioner as an ordinary bankrupt, and, denying a stay, to sell his property without any equity of redemption. *Sheets* v. *Livy*, 99 F. (2d) 917.

Recurring to the real question at issue, the majority opinion says that Section 75 nowhere mentions initial good faith as a prerequisite to invoking subsection (s). As to this, the note to *Wright* v. *Vinton Branch*, 300 U. S. at page 462, seems to me to be ample authority. It elaborates upon the construction of the act in the body of the opinion. Apparently the note has the full sanction of the court, and, in addition to what I have previously quoted, it says: "It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition in the outset." That is, he could not have filed his original petition, amended under subsection (s).

The holding which seems to me to be clearly untenable is that an amendment, not of the averments but of the prayer of the petition, supplies a constituent element essential to confer the additional jurisdiction for relief of debtors which was the primary object of the original petition. Having made good faith essential to the filing of the original petition, it was unnecessary to repeat the requirement in the provision for the amendment. Referring to the petition, an amendment of which is the subject of our disagreement, the statute provides as follows: "Upon the filing of such a petition or answer the judge shall enter an order approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it." 11 U. S. C. A. 202 (a).

The above quoted sentence is from section 74 (a), which applies to any person, except a corporation, seeking a composition or extension of his debts. Appellant is a person and not a corporation; therefore, it includes him; but he belongs to a particular class of persons, which is further dealt with in Section 75. He is a farmer, and when the latter seeks a composition or extension of his debts, additional jurisdiction is conferred on the bankruptcy court, but the general requirement that the petition must be filed in good faith is not relaxed. This is put beyond doubt by subsection (i) which provides: "The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of

financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In applications for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted."

When these statutory provisions are rounded out by the constitutional construction of Section 75(s) in *Wright* v. *Vinton Branch, supra,* and particularly by note 6 to the opinion of the court in that case, the court below was fully warranted in its dismissal of the proceeding, because there was no hope of rehabilitation and the amended petition was not filed in good faith.

Merely as a person, a farmer may file a petition under section 74, seeking a composition or extension of his debts; he may amend it by alleging that he is a farmer and bring the proceeding within the additional jurisdiction granted under Section 75; and failing to reach an agreement with his creditors, he may amend the prayer of his petition and ask to be adjudged a bankrupt under Section 75 (s), wherein still further powers are given to the bankruptcy court. The statute declares that these are grants of jurisdiction in addition to those theretofore possessed by the bankruptcy courts. 11 U. S. C. A. 201 (Section 73). The judicial power of the United States having the capacity to receive this jurisdiction from the Congress, the bankruptcy courts may exercise it if a person of the class designated seeks to invoke it by proper petition filed in good faith.

No good faith is required in ordinary bankruptcy; the debtor's unexempt property is vested in a trustee for the benefit of his creditors; he is discharged from his provable debts; and nothing further is expected of him with respect to his former indebtedness; but sections 74 and 75 are intended to compose the debts and rehabilitate the debtor, either with or without an adjudication. In the latter instance, in the absence of good faith or the hope of rehabilitation, the proceeding is futile, and the law will not do an idle thing, especially since it will not help the debtor, and

will hinder and delay the creditors. Sections 73, 74, and 75 are in one act, were passed at the same time (47 Stat. 1467), and should be construed together as the Congress was dealing with the whole subject at the same time, as indicated in 75 (r) which includes section 74 in its definition of a farmer.

The status of the debtor is not changed under the amendment of his petition and his adjudication in bankruptcy under section 75 (s). This is shown by section 75 (n), which provides that upon the filing of the petition the debtor-farmer subjects himself and his property to the exclusive jurisdiction of the court, and that such jurisdiction shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed. Therefore, the filing of the amended petition asking to be adjudged a bankrupt did not take away the power of the court to dismiss the petition (if not filed in good faith) expressly granted under section 74 (a) and impliedly brought forward in section 75 by paragraph (i) of the latter section.

Notice to creditors is not necessary before dismissal of the original or amended petition. The statute does not require it, because the jurisdiction being exercise is primarily for the relief of debtors. Herein is another difference between the two procedures. The procedure in ordinary bankruptcy, where the rights of creditors are considered first, is incompatible in many respects with the beneficent procedure in recent legislation accorded distressed debtors. The basis for a contrary view may be found in the contention that, while the court might have dismissed the original petition herein without notice to creditors, it did not do so, but approved the same, and that the order of approval is *res judicata*. This contention readily gives way upon examination. First, the approval was upon the *ex parte* application of appellant, who did not file the petition or amendment thereto in good faith and may not complain of its dismissal. Second, no one was prejudiced by the dismissal, not even appellant, because, in the absence of good faith or hope of rehabilitation, he is not entitled to a stay,

or to retention of possession of his property after adjudication, or to an equity of redemption after a sale thereof, or to the other benefits of the liberal legislation intended for the relief of debtors in an economic emergency. Third, the bankruptcy court is always open; it has no terms fixed by law, and may review an order of this kind at any time before the proceeding is finally closed.

We have seen that every individual seeking a composition with creditors must file a petition in good faith or the court has power to dismiss it, and should do so under section 74 (a), without notice to creditors. What reason can be urged for exempting a farmer from this requirement? Upon what principle of justice should a farmer who has no hope of rehabilitation be permitted to delay or hinder creditors with a sham proceeding for composition or extension of his debts? Good faith and hope of rehabilitation are not unusual requirements, and it is inconceivable that the Congress intended a discrimination in this respect when it was dealing with farmers and other individuals at the same time and in the same act: H. R. No. 14,359, for the relief of debtors. 47 Stat. 1467. Therefore, the only reasonable construction of the act is that a farmer is a person entitled to file a petition under either section 74 or 75, and a petition under either section may be dismissed for lack of good faith. This view is confirmed by subsection (i) of section 75, which requires confirmation of the proposal by the court if "the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or act herein forbidden." This statute itself is enough to show the intent of Congress, even if a farmer is not a person entitled to file a petition under section 74 (a) which may be dismissed by the court, for want of good faith, without notice to creditors.

Since the appellant has given no indication of a desire to become an ordinary bankrupt, and since the ruling of the majority is that neither good faith nor hope of rehabilitation is essential to an adjudication upon the amended petition, which entitles him to invoke the court's emergency jurisdiction intended especially for the relief of debtors, I dissent, with deference, from the order overruling the petition for a rehearing.

Appendix "E".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8758.

In the Matter of JOHN BEVERLY HENDERSON, *Debtor*,

PETITION FOR COMPOSITION AND EXTENSION.

In Forma Pauperis.

Appeal from the District Court of the United States for the Eastern District of Texas.

(December 22, 1938.)

Before Hutcheson, Holmes, and McCord, Circuit Judges.

HOLMES, *Circuit Judge:*

Appellant, John Beverly Henderson, filed his petition praying that he be allowed to effect a composition or extension under the provisions of Section 75 of the Bankruptcy Act (11 U. S. C. A. 203). At the first meeting of creditors, called by the conciliation commissioner to whom the petition was referred, he proposed a plan of conciliation and extension, but presented no acceptances from any of his creditors and obtained none at that time. No order was entered fixing the time within which a plan might be presented, and the matter lay dormant for sixty-one days, whereupon the conciliation commissioner certified the facts with a recommendation that the petition be dismissed. On the recommendation of the supervising conciliation commissioner, the court entered an order dismissing the petition, no notice of the proposed dismissal having been given to appellant. Thereafter, and within seventy-four days after the first meeting, appellant filed his amended petition for adjudication under Section 75 (S) of the Bankruptcy Act, 11 U. S. C. A. 203 (S), and, on learning that the original petition had been dismissed, prayed that the order of dismissal be set aside and the case reinstated.

The matter was referred to the supervising conciliation commissioner, who held hearings on the petition and certi-

fied his findings of fact and conclusions of law, together with his recommendation that the petition be denied. The court thereupon denied the petition, and this appeal is prosecuted from the order dismissing the original petition and the order denying reinstatement.

No transcript of the testimony heard by the supervising conciliation commissioner is contained in the record, but it appears that his report and findings were adopted by the court. From these findings, it appears that, during the time elapsing between the first meeting of creditors and the filing of the amended petition, appellant took no steps to procure acceptances of the plan offered, except to communicate with one of the twenty creditors affected by the plan. It further appears that the plan offered proposed that, as to nineteen creditors, he be given a three-year moratorium on his debts, including the interest thereon, without subjecting either his person or his property to the jurisdiction of the court, and without applying his income to the payment of rent during the three years, proposing to pay only five per cent interest during the period, a smaller rate of interest than was allowed by law.

In denying the petition for reinstatement, the court found that no good-faith effort to effect a composition or extension had been made, and that appellant was not entitled to the relief provided for in Section 75 (S) of the Bankruptcy Act. *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404.

Appellant challenges the action of the court on the ground that, in the absence of an order limiting the time within which he could present a plan for confirmation, he had a maximum of ninety days, under paragraph 4 of Section L of the General Orders, and that, since this time had not elapsed, the order of dismissal was prematurely entered. It may be questioned whether or not the debtor can make this contention, since it is implied in the General Orders that such time as is allowed by the court will be on his application, and the absence of such allowance results from an absence of a request therefor; and for the further reason that he is charged with notice of the various steps taken in the proceeding, which includes the reports of the conciliation commissioner and the supervising conciliation commissioner. *Cf. Massey* v. *Farmers & Merchants Nat. Bank*, 94 F. (2d) 526.

In the present case, the finding of the court on the lack of good faith is not questioned, either in the briefs or in the record. The application to the court below for reinstatement of the petition was not that appellant be allowed to make a good-faith offer, but that he be allowed additional delay for the filing of a petition for adjudication under Section S. There is no apparent intention or desire to effect a conciliation or extension, but it appears that appellant's one purpose is to hinder and delay his creditors.

It has been pointed out that the relief afforded in subsection S is not an end in itself, but is ancillary to and in aid of the rehabilitation of distressed farmers, as contemplated under the preceding subsections of Section 75. The constitutionality of the section is grounded upon the principle that proceedings for the conciliation of creditors and the composition and extension of debts are within the scope of the bankruptcy provision of the Constitution. Such a proceeding may not be converted into a sham for the purpose of gaining whatever the petitioner wishes by way of procedural delays and hindrances to creditors, where no legitimate purpose of the act will be served. *Wright* v. *Vinton Branch*, 300 U. S. 440, 462, 57 Sup. Ct. 556, 81 L. Ed. 736; *Stevenson* v. *Clark*, 86 F. (2d) 330, certiorari denied, 300 U. S. 666, 57 Sup. Ct. 508, 81 L. Ed. 874; *Knotts* v. *First Carolinas*, 86 F. (2d) 551, certiorari denied, 297 U. S. 706, 56 Sup. Ct. 498, 80 L. Ed. 994; *Baxter* v. *Savings Bank*, 92 F. (2d) 709; *Massey* v. *Farmers and Merchants*, 94 F. (2d) 526, certiorari dismissed on motion of petitioner, 303 U. S. 665, 58 Sup. Ct. 761, 82 L. Ed. 732; *Sheets* v. *Livy*, 97 F. (2d) 674; *Doak* v. *Federal Land Bank*, 99 F. (2d) 145; *Cowherd* v. *Phoenix Joint Stock Land Bank*, 99 F. (2d) 225; *Bender* v. *Federal Farm Mortgage Corp.*, 99 F. (2d) 252.

The judgment of the district court is Affirmed.

Appendix "F".

HUTCHESON, *Circuit Judge*, dissenting:

I dissent. Sec. 203 (s) Title 11, U. S. C. A. without exception, limitation or qualification provides:

> "(s) Any farmer, failing to obtain the acceptance of a majority in number and amount of all creditors whose

claims are affected by a composition, and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt."

The majority opinion, on the authority of *Baxter* v. *Savings Bank*, 92 Fed. (2d) 404, denies this farmer this right.

In *Bartels* v. *John Hancock Mutual Life Insurance Company*, this day decided, the majority is disapproving the holdings in the *Baxter* case, that the right of the farmer to ask to be adjudged a bankrupt under Sec. (s) is qualified by, indeed is dependent upon, whether his proposition for a composition under preceding subdivisions is deemed to have been made in good faith.

For the reasons given in the majority opinion in the *Bartels* case, I respectfully dissent from the opinion of the majority, in this one.

Appendix "G".

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8949.

HERBERT B. WILSON, Administrator of the Estate of Modena Lee Wilson, Deceased, Bankrupt, *Appellant*,

Versus

ALLIANCE LIFE INSURANCE COMPANY, *Appellee*.

In Forma Pauperis.

Appeal from the District Court of the United States for the Eastern District of Texas.

(March 16, 1939.)

Before Sibley, Holmes and McCord, Circuit Judges.

HOLMES, *Circuit Judge:*

This appeal is from an order setting aside a former order of adjudication in bankruptcy under Section 75 (s)

of the Bankruptcy Act (11 U. S. C. A. 203 (s) and dismissing the proceedings, because the petition was not filed in good faith and there was no hope of rehabilitation.

During her lifetime, appellant's intestate filed her petition to effect a composition or extension of her debts, and submitted her offer at the first meeting of creditors. The offer being refused, she filed her amended petition under Section 75 (s), praying to be adjudicated a bankrupt and afforded the relief therein provided. The order of adjudication was regularly entered, and proceedings for the collection of debts and enforcement of liens were stayed in accordance with the procedure prescribed in the act. Thereafter, the bankrupt died, and appellant, having qualified as administrator, petitioned to be allowed to proceed in behalf of her estate. Appellee entered its appearance in opposition to appellant's petition, alleging that the order of adjudication was improvidently entered; that no offer of composition had been made in good faith prior to adjudication; that no feasible plan of liquidation had been submitted with the offer; that there was no reasonable hope of rehabilitation; that the land upon which appellee held a lien constituted the corpus of the estate and was worth less than the amount of the lien, leaving no equity for the estate; and prayed that the order of adjudication be set aside and the case dismissed.

On a reference to the Supervising Conciliation Commissioner, a hearing was had, after which the Commissioner found that the proposed plan of composition and extension was not made in good faith; that neither the bankrupt nor appellant had any feasible plan of rehabilitation; and that the amount of the debt to appellee was in excess of the value of the security, whereby further administration would be of no benefit to the estate. The court adopted the report of the Supervising Conciliation Commissioner, set aside the order of adjudication, and dismissed the proceeding. Relying principally upon the case of *Benno Bartels* v. *John Hancock Insurance Co.*, 100 F. (2d) 813, appellant prosecutes this appeal.

On the ground that the appeal was perfected under Section 24 (a) of the Bankruptcy Act (11 U. S. C. A. 47 (a), whereas it should have been under Section 24 (b) (11

U. S. C. A. 47 (b), appellee moves to dismiss the appeal. Since the record is sufficient to present questions of law which are determinative of the controversy, the motion to dismiss will be overruled, and the appeal will be allowed as if brought under Section 24 (b) for the consideration of the questions of law only. *Baxter* v. *Savings Bank of Utica*, 92 F. (2) 404, 405, and cases cited.

Accepting the finding that the offer was not made in good faith and that there is no reasonable hope of rehabilitation, as we must on this appeal, appellant's contention is reduced to the proposition that the district court was without authority to set aside the adjudication and dismiss the proceeding, but was bound to continue the stay provided for or to liquidate according to the procedure and subject to the limitations provided for in the act. Following what we conceive to be the correct interpretation of the case of *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, we have held that good faith and a reasonable hope of rehabilitation in the proceedings leading to, as well as in making, the offer of composition and extension under Section 75 of the Act (11 U. S. C. A. 203 (a)-(r) are necessary prerequisites to the benefits provided under subsection (s) (11 U. S. C. A. 203 (s). *Baxter* v. *Savings Bank of Utica, supra*, 92 F. (2), 404, 406; *In re John Beverly Henderson*, 100 F. (2) 820.

As to the contention that the authority to dismiss does not exist in the district court, because not expressly conferred by the act, it should be noted that the general bankruptcy act contains no provision authorizing a dismissal for fraud or lack of jurisdiction. It is true that the bankruptcy court is limited in its jurisdiction, being created by statute; but, even so, it is a court of equity, within its sphere, and may protect itself from being used as an instrument of hindering and delaying creditors when the debtor, in filing the petition, was acting in bad faith and without hope of rehabilitation. To let the adjudication stand in such circumstances would be to sanction the continuation of an unwarranted imposition upon the jurisdiction of the court.

Furthermore, the petition to be adjudged a bankrupt under 75 (s) is merely an amendment to the prayer of the

petition for a composition and extension under 75 (a)-(r), as to which there is express statutory authority to dismiss because not filed in good faith. The argument of appellant is reduced to this: that, although there is statutory authority to dismiss the original petition for lack of good faith, this authority is lost when the prayer of the petition is amended by asking to be adjudged a bankrupt, even though the prayer is amended under a separate paragraph of the same act.

Added to the principle that the law will not do an idle thing, we have, then, to support the action of the court in dismissing the petition and amendment thereto: 1, the inherent power of a court of bankruptcy to protect its jurisdiction from abuse; 2, the express statutory power to dismiss the original petition under Section 75 (a)-(r) for lack of good faith, the prayer only of the petition being amended under paragraph (s); 3, the construction of the act by the supreme court in *Wright* v. *Vinton Branch, supra*, upholding its constitutionality on the ground that the bankruptcy court has the power to put an end to the proceedings, if not filed in good faith; 4, the opinion of Mr. Justice Brandeis, that relief under 75 (s) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Section 75 (a)-(r), followed by his statement that "if the debtor is beyond all reasonable hope of financial rehabilitation, and the proceedings under Section 75 cannot be expected to have any effect beyond postponing inevitable liquidation, the proceedings will be halted at the outset." 300 U. S. 462. If further implication of power is needed, it is found in 75 (i), which provides that the court shall confirm the proposal if satisfied that the offer and its acceptance are in good faith.

The judgment of the district court is Affirmed.

Appendix "H".

SIBLEY, *Circuit Judge*, concurring:

In the case of John Beverly Henderson, 100 Fed. (2d) 820, the farmer-debtor under Sect. 75 of the Bankruptcy Act had not been adjudicated a bankrupt. In the case of

Benno Bartels, 100 Fed. (2d) 813, he had been adjudicated. The present case falls directly under the latter decision, for Modena Wilson had been adjudged a bankrupt for about two years when the secured creditor on motion got a revocation of the adjudication and a dismissal of the proceedings. I persist in thinking the exposition of the law in the Benno Bartels case to be correct. Section 74 and Section 75 are not to be construed together as composite legislation. Each is a separate scheme to be distinguished from the other. In Section 74 any person not a corporation, whether in or out of bankruptcy, may petition in good faith and obtain the provided relief. Subsection (1) provides for an adjudication in bankruptcy of the debtor if the proceeding was commenced or prolonged for the purpose of delaying creditors or delaying an adjudication, or if confirmation of his proposal is denied, except that in the case of a farmer he must consent to adjudication. Section 75 sets up a more elaborate organization, including conciliation commissioners, and it applies only to farmers. It contains several provisions which are repetitions of what was enacted in Section 74, but this only shows that the two are independent of one another and one includes nothing merely because it is in the other. Under Section 75 the farmer-debtor who fails to obtain the consent of his creditors to his plan of extension is not liquidated as of course, as the debtor under Section 74 (1) is, but Subsection (s) permits him without any conditions whatever to amend his petition and ask to be adjudged a bankrupt. When that is done he is a voluntary bankrupt, and comes under the general bankruptcy law, except as Subsection (s) has modified it. The main modification is that instead of surrendering all his property at once he may on request keep it upon terms fixed and supervised by the court for three years, with a view of rehabilitating the farmer as such. He is still a bankrupt during the effort at rehabilitation. If he fails to keep the terms or it appears that he will not be able to refinance himself in three years, or if rehabilitation fails because secured creditors pursuing their rights take the farm away, the rehabilitation of course fails, but the farmer is still in voluntary bankruptcy. A secured creditor cannot dismiss the proceeding

on motion or set aside the adjudication. His right is, on sufficient grounds, to have his security abandoned to him if there is no equity for the estate, or to have the court sell it for him, or permit him to foreclose. The farmer and his other creditors are entitled to go ahead in bankruptcy on this adjudication, and the bankruptcy case can be dismissed only after notice to creditors. As in the Benno Bartels case, so in this, the secured creditor, while he might have asked a release or a sale of his security by the court for the reasons he urged, had no standing to have the adjudication set aside and the case dismissed.

Nevertheless, in the circumstances here disclosed, this erroneous action did no one any harm. The secured creditor gets opportunity to foreclose on his security. There is no equity in it and no other estate, and no possible benefit to the slight unsecured indebtedness in continuing the bankruptcy. The debtor herself was dead and a discharge would do her no good. While the regular course would have been to abandon the farm to the secured creditor, and to close the estate without a trustee because there are no assets, the course taken accomplishes the same thing. Because no injury was done anyone I concur in affirming the judgment.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 33

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

versus

BENNO BARTELS, RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 33

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

versus

BENNO BARTELS, RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

To the Honorable The Chief Justice and Associate Justices of The Supreme Court of the United States:

OPINIONS OF THE CIRCUIT COURT OF APPEALS.

The majority and dissenting opinions of the Circuit Court of Appeals for the Fifth Circuit in this case are reported in 100 F. (2d) 813-819. And those opinions are, also, shown in the Transcript of the Record in this case before this Court. (R. 118-124; 133-138).

GROUNDS OF JURISDICTION.

Petitioner presents the following grounds as the basis upon which it is contended that the Supreme Court has jurisdiction to review the judgment of the Circuit Court of Appeals in this case:

1. The majority opinion and decision of the Circuit Court of Appeals in this case reflects a most unusual division of opinion and conflict among four judges of the Circuit Court of Appeals for the Fifth Circuit, as shown in the majority and dissenting opinions in this case and in other similar cases decided by that court at about the same time, namely: *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404, *In re John Beverly Henderson*, 100 F. (2d) 280, *Wilson, Administrator*, v. *Alliance Life Insurance Company*, decided on March 16, 1939, not yet officially reported (Appendices "D" and "E" of this brief); and such division of opinion and conflict within the Circuit Court of Appeals for the Fifth Circuit calls for an exercise of the Supreme Court's power of supervision.

2. The majority opinion and decision of the Circuit Court of Appeals in this case is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 462, 81 L. Ed. 736, 743, 112 A. L. R. 1455.

3. The majority opinion and decision of the Circuit Court of Appeals in this case is in direct conflict with the decisions of other Circuit Courts of Appeal, upon the same questions involved in this case, in the following cases, among others, namely:

In re Borgelt (Seventh Circuit), 79 F. (2d) 929.

Helbstab v. Equitable Life Assur. Soc. (Tenth Circuit), 91 F. (2d) 655, 659.

Pearce v. *Coller* (Third Circuit), 92 F. (2d) 237 (certiorari denied).

In re Coleman (Sixth Circuit), 93 F. (2d) 1001, C. C. A. (1938).

Massey v. *Farmers & Merchants Bank* (Fourth Circuit), 94 F. (2d) 526 (1938).

4. The majority opinion and decision of the Circuit Court of Appeals in this case has misconstrued and misapplied a Federal statute, to-wit: Section 75 (s) of the Bankruptcy Act as amended (11 U. S. C. A., Sec. 203 [s]).

5. The petitioner, by the construction and application given by the majority opinion and decision of the Circuit Court of Appeals in this case to Section 75 (s) of the Bankruptcy Act, as amended, has been deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

6. The Circuit Court of Appeals, by the majority opinion and decision in this case, has erroneously failed to give effect to fact findings of the District Court, which are not questioned, criticized, or rejected by the Circuit Court of Appeals, and which are amply supported by evidence in the record.

STATEMENT OF THE CASE.

This case concerns the proper construction and application of Subsection (s) of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s), relating to agricultural compositions and extensions. (Appendix "A" of this brief).

Upon the motion of petitioner, John Hancock Mutual Life Insurance Company, a lien creditor, the District Court

dismissed the petition for composition and extension of Benno Bartels, the debtor. As a basis for the decree or order of dismissal, the District Court, after a full hearing, found: (1) that the debtor had no equity in his farm, which constituted the principal asset of his estate, and upon which the lien creditor held a mortgage; (2) that the debtor offered no definite or feasible plan for a composition and extension of his debts; (3) that there was no reasonable hope of the debtor's financial rehabilitation out of the property involved in the estate; and (4) that the debtor's petition was not filed in good faith in a bona fide attempt to effect a composition and extension of his debts. (R. 106-109).

On the debtor's appeal from the order of the District Court dismissing the petition and all proceedings thereunder, the Circuit Court of Appeals for the Fifth Circuit, by a divided court, reversed the judgment and decree of the District Court. (R. 124).

The majority opinion of the Circuit Court of Appeals in this case, written by Circuit Judge Sibley and concurred in by Circuit Judge Hutcheson (R. 118-123), while not questioning the fact findings of the District Court, nevertheless, holds that the District Court was without the power to dismiss the debtor's petition and proceedings thereunder. In a dissenting opinion in this case (R. 123-124), Circuit Judge Holmes, expressing the view that the judgment and decree of the District Court should be affirmed, said in part:

> "In sustaining the constitutionality of the act, the Supreme Court held that the proceeding could be maintained only as a *bona fide* effort on the part of the debtor to rehabilitate himself, and that this was without regard to any provision of the act specifically requiring good faith. In a footnote to its opinion, it says: 'Relief under Sec. 75 (S) may be obtained only by one who has made a *bona fide* at-

tempt, and has failed, to effect a composition under Sec. 75 (a) (r).' *Wright* v. *Vinton Branch*, 300 U. S. 440, 462. It further states that the proceedings will be halted at the outset if the debtor is beyond hope of rehabilitation. Such a pronouncement, when made the basis of a holding that an enforced delay in favor of one class of litigants for a period of three years does not violate the due-process clause of the Constitution, should not be disregarded."

* * * * * * * * *

"The decision of this case is unfortunate in view of our decision in *John Beverly Henderson, Debtor*, No. 8758, (100 F. [2d] 820), this day decided. The two cases were submitted at the same term of court and were considered together; but, owing to the fact that exactly the same judges did not sit in both cases, a different result is reached."

Thereafter, on petition for rehearing filed in the Circuit Court of Appeals, the majority of the court, composed of Circuit Judges Sibley and Hutcheson, adhered to its original opinion and denied a rehearing. And, upon the petition for rehearing, Circuit Judge Holmes, in a second dissenting opinion (R. 133-138), said in part:

"Recurring to the real question at issue, the majority opinion says that Section 75 nowhere mentions initial good faith as a prerequisite to invoking subsection (s). As to this, the note to *Wright* v. *Vinton Branch*, 300 U. S. at page 462, seems to me to be ample authority. It elaborates upon the construction of the act in the body of the opinion. Apparently the note has the full sanction of the court, and, in addition to what I have previously quoted, it says: 'It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition in the outset.' That is, he could not have filed his original petition, amended under subsection (s)."

On the same day on which the Circuit Court of Appeals for the Fifth Circuit, by the majority opinion, reversed this case and held that the District Court was in error in dismissing the debtor's petition and all proceedings thereunder, the same court, in an opinion by Circuit Judge Holmes, concurred in by Circuit Judge McCord, then constituting the majority of the court, reached a different result and rendered a contrary opinion in the case of *John Beverly Henderson, Debtor,* (100 F. [2d] 820). In the *John Beverly Henderson* case, Circuit Judge Hutcheson dissented for the reasons given in the majority opinion in the *Bartels* case that day decided. Copies of the majority and dissenting opinions in the *John Beverly Henderson* case are appended to this brief. (Appendices "B" and "C" of this brief). Thus, owing to the fact that exactly the same judges did not sit in this, the *Bartels* case, and in the *Henderson* case, both of which were decided by the Circuit Court of Appeals for the Fifth Circuit on the same day, different results and judgments were reached in the two cases.

Thereafter, on March 16, 1939, the Circuit Court of Appeals for the Fifth Circuit, in the case of *Wilson, Administrator,* v. *Alliance Life Insurance Company,* (not yet officially reported), (Appendices "D" and "E" of this brief), before Circuit Judges Sibley, Holmes, and McCord, in an opinion by Circuit Judge Holmes, then of the majority, affirmed the judgment of the District Court dismissing the debtor's petition and all proceedings thereunder. And, in that case, Circuit Judge Sibley, who had theretofore been of the majority in this, the *Bartels* case, wrote a minority opinion adhering to the views originally expressed by him in this, the *Bartels* case. In *Wilson, Administrator,* v. *Alliance Life Insurance Company, supra,* Circuit Judge Holmes, speaking for the majority, said, in part:

"Accepting the finding that the order was not made in good faith and that there is no reasonable hope of rehabilitation, as we must on this appeal, appellant's contention is reduced to the proposition that the district court was without authority to set aside the adjudication and dismiss the proceeding, but was bound to continue the stay provided for or to liquidate according to the procedure and subject to the limitations provided for in the act. Following what we conceive to be the correct interpretation of the case of *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, we have held that good faith and a reasonable hope of rehabilitation in the proceedings leading to, as well as in making, the offer of composition and extension under Section 75 of the act (11 U. S. C. A. 203 [a]-[r] are necessary prerequisites to the benefits provided under subsection (s) (11 U. S. C. A. 203 [s]). *Baxter* v. *Savings Bank of Utica*, *supra*, 92 F. (2d) 404, 406; *In re John Beverly Henderson*, 100 F. (2d) 820."

Thus, the Supreme Court is asked, in this, the *Bartels* case, to review a judgment and decree of the Circuit Court of Appeals for the Fifth Circuit, rendered by a divided court, in direct conflict with a decision, also, by a divided court, in a similar case decided by the same court on the same day (*In re John Beverly Henderson*, 100 F. [2d] 820), and, likewise, in direct conflict with a decision of the same court, rendered shortly thereafter in a similar case (*Wilson, Administrator,* v. *Alliance Life Insurance Company*, Appendices "D" and "E" of this brief), where the conflicts in each of the three similar cases, as pointedly stated in the majority and dissenting opinions, arise upon the interpretation, construction, and application of Subsection (s) of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s), as previously construed and interpreted by the Supreme Court of the United States in *Wright* v.

Vinton Branch Bank, 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455. The conflicts are irreconcilable. In this, the *Bartels* case, the decision of the majority, *as then constituted*, is not in accord with the decision of the Supreme Court in *Wright* v. *Vinton Bank* (*supra*); in each of the two cases, of *John Beverly Henderson*, and *Wilson, Administrator*, v. *Alliance Life Insurance Company*, *supra*, the decision of the majority, *as then constituted*, is in accord with the decision of the Supreme Court of the United States in *Wright* v. *Vinton Bank*, *supra*.

The petitioner represents that the principal question involved in this case is as follows:

Where, under the accepted findings of the District Court, the debtor had no equity in his farm, the debtor offered no feasible plan of composition and extension, there was no hope of the debtor's financial rehabilitation, and the debtor's petition was not filed in good faith, was the District Court authorized to dismiss the debtor's petition and proceedings under Subsection (s), of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Sec. 203 (s)?

SPECIFICATION OF ASSIGNED ERRORS.

Petitioner specifies and urges in this Court the following assigned errors, all of which were presented as grounds in petitioner's motion for rehearing filed in the Circuit Court of Appeals and overruled by that Court, namely:

FIRST.

The decision and judgment of the Circuit Court of Appeals in this case, whereby the judgment of the District Court, dismissing the debtor's petition and all proceedings thereunder, was reversed and the case was ordered reinstated for further proceedings, is erroneous, because such

decision and judgment is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 462, 57 Sup. Ct. 556, 81 L. Ed. 736, 743, 112 A. L. R. 1455, wherein the Supreme Court has distinctly held: (1) that "Relief under Section 75 (s) (Bankruptcy Act as amended, 11 U. S. C. A., Sec. 203 [s]), may be obtained only by one who has made a *bona fide* attempt, and has failed, to effect a composition under Section 75 (a)-(r) (Bankruptcy Act as amended)"; (2) that a debtor's proceeding under Section 75 of the Bankruptcy Act "will be halted at the outset" if the debtor is beyond all reasonable hope of financial rehabilitation; and (3) that, without regard to any provision of the Act (Section 75 of the Bankruptcy Act, 11 U. S. C. A.), or any specific requirement that the debtor's petition be made in good faith, nevertheless, good faith on the part of the petitioning debtor is required. (First Ground of Motion for Rehearing, R. 126).

SECOND.

The Circuit Court of Appeals erred in its decision and judgment in this case in overruling and rejecting the holding previously made by it in the case of *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404, in which case that court had said:

> "It has been pointed out that good faith in this connection means more than the absence of actual fraud. A bona fide effort to compromise with creditors is made a prerequisite to the relief afforded under subsection (s). * * * The primary purpose of Section 75 is the composition and extension of the debts of distressed farmers. The function of subsection (s) is to provide temporary relief to those who might be able to adjust their difficulties but have failed in the preliminary proceeding. Its presence in the Act has the additional effect of pro-

viding an inducement to secured creditors to accept a feasible plan when offered. Thus, its presence in the Act is in aid of the composition provisions, resort to which is made a prerequisite to the relief afforded. It may not be treated as an end in itself, with the other proceedings as mere procedural steps to be taken toward the relief there afforded. It follows that the offer of composition or extension was not made in good faith." (Second Ground of Motion for Rehearing, R. 127).

THIRD.

The Circuit Court of Appeals erred in rendering its decision and judgment in this case, whereby the judgment of the District Court was reversed, because such decision is in direct conflict with the decision rendered by the same Court on the same day in the case of *John Beverly Henderson, Debtor,* (100 F. [2d] 820; Appendix "B" of this brief), in which case the majority follows and adheres to a previous decision of the same Court in the case of *Baxter* v. *Savings Bank of Utica,* 92 F. (2d) 402. (Third Ground of Motion for Rehearing, R. 128-129).

FOURTH.

The Circuit Court of Appeals erred in its decision and judgment reversing the judgment of the District Court, which dismissed the debtor's petition and proceedings thereunder, because the decision of a majority of that court has misconstrued and misapplied Section 75 (s) of the Bankruptcy Act as amended, (11 U. S. C. A. Section 203 [s]), in that the court's construction, interpretation, and application of said statute is in conflict with a prior construction, interpretation, and application of said statute as made by the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank,* 300 U. S. 440, 462, 81 L.

Ed. 736, 743. (Fourth Ground of Motion for Rehearing, R. 129).

FIFTH.

The Circuit Court of Appeals erred in its decision, whereby the judgment of the District Court dismissing the debtor's petition and all proceedings thereunder was reversed, because that court thereby misconstrued, misinterpreted, and misapplied Section 75 (s) of the Bankruptcy Act as amended, (11 U. S. C. A. 203 [s]), so as to deny to petitioner, John Hancock Mutual Life Insurance Company, due process of law and to deprive it of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, in that petitioner will be postponed and delayed, to its detriment and loss, in the enforcement of its debt and lien where, according to the unrejected findings of the trial court, the debtor had no equity in his farm, the debtor's petition was not filed in good faith in a bona fide effort to obtain a composition and extension of his debts, and there was no reasonable hope of the debtor's financial rehabilitation. (Fifth Ground of Motion for Rehearing, R. 129-130).

SIXTH.

The Circuit Court of Appeals erred in reversing this case, because the District Court found that the debtor had no equity in the farm, that his petition was not filed in good faith, and that there was no reasonable hope of his financial rehabilitation, and those findings are not questioned, criticised, or rejected, by reason whereof that court has erroneously failed to give effect to the fact findings of the District Court which are amply supported by evidence in the record. (Sixth Ground of Motion for Rehearing, R. 130).

ARGUMENT.

The order or judgment of the District Court in this case is shown at page 98 of the printed transcript of the record. That order sets aside a previous order which adjudicated the debtor, Benno Bartels, a bankrupt under Section 75, subsection (s). And the order, also, dismisses the debtor's petition for composition or extension and all proceedings thereunder. The petitioner, John Hancock Mutual Life Insurance Company, submits that the order made by the District Court is amply supported by the record. The record shows and the District Court has found: (1) That there was no substantial equity or value over and above the lien indebtedness of petitioner, John Hancock Mutual Life Insurance Company, in the one hundred acre farm owned by the debtor, Benno Bartels; (2) that the debtor, Benno Bartels, had not submitted and could not submit to his creditors, (particularly, to the creditor John Hancock Mutual Life Insurance Company), any definite or feasible proposal for a composition or extension; and (3) that the financial condition of the debtor generally was such that there was no reasonable probability of his rehabilitation. (R. 99-108). The findings of the District Court, made the basis for the decree of dismissal, are not questioned in either the majority opinion or in the two dissenting opinions in this case.

The Debtor Had No Equity in His Farm.

The District Court, in findings which appear in the transcript of the record, said:

> "The Court fully realizes that it ought not to apply emergency prices to a matter of this kind or foreclose the possibility of rehabilitation on the theory that immediate liquidation could not be had. However, there is nothing here to indicate to the

Court that there is any reasonable probability of this property being sold for enough to give any substantial equity at all to the debtor. The charges are mounting rapidly and any equity that may exist will be wiped out." (R. 107).

The farm owned by the debtor, Bartels, on which John Hancock Mutual Life Insurance Company held a first and superior lien, contained one hundred acres of land situated in Guadalupe County, Texas, with improvements thereon. The lien indebtedness calculated up to March 23, 1938, amounted to $8,195.37. (R. 8-9). For the purpose of making a loan on the land, the Federal Land Bank fixed the loan value at $54.00 per acre, and the sum of $5,400.00 was the highest amount that the Federal Land Bank would lend on the land. (R. 29). A disinterested witness, Wm. F. Schutz, a real estate man who has dealt extensively in farms and real estate, testified: that the debtor's farm land was worth $40.00 per acre, and the improvements were worth $2,000.00, making a total valuation of $6,000.00—an amount considerably less than the existing lien debt held by John Hancock Mutual Life Insurance Company. (R. 94).

The record, further, shows that from fifteen to twenty-five acres of the debtor's farm are subject to overflow from a creek or "draw." The total amount of the cultivated land on the place was 85 acres. (R. 30).

It was shown that, within the last three or four years, the debtor has realized, as revenue from the farm, about $300.00 or $400.00 a year, whereas, annual interest alone on the lien debt amounted to $390.00. (R. 8-24).

The Debtor Offered No Definite or Feasible Proposal For a Composition or Extension.

The District Court found that the debtor, Bartels, had no definite plan or proposal to make to his creditors for a composition and extension of his debts; and, in that connection, the court quoted the following questions and answers from the record:

> "Q. Do you have any plan or proposal to submit to your creditors, Mr. Bartels, as a composition or extension of your debts in these proceedings?
>
> "A. No. I want to pay everybody that I owe, sure.
>
> "Q. You don't have any definite, concrete plan now, do you?
>
> "A. No, not exactly, but I want to pay everybody I owe.
>
> "Q. How are you going to raise the money to farm the land this coming year? Can you tell us how you are going to raise the money to farm it?
>
> "A. I will just have to get out and make a little." (R. 102).

It has been held repeatedly that the submission of some feasible plan or proposal for composition or extension is an absolute prerequisite for the debtor to proceed under Subsection (s) and to obtain the three year stay provided for by the Act. The authorities are clear to the point that some feasible and equitable plan or proposal must be made by the debtor to his creditors before the debtor is entitled to proceed under Subsection (s). For example, in the case of *In re Hilliker*, 9 F. Sup. 948, opinion by District Judge James, Southern District of California, the debtor's petition for composition and extension had been filed; and, thereafter, the debtor amended his petition under Subsection (s). In that case the court said:

"I am not intending in this case to hold that the petition as first filed before the Conciliation Commissioner was accompanied with bad faith sufficient to justify an order of dismissal on that ground. It is plain to me, however, that where a person initiates a petition before a Conciliation Commissioner and without submitting in good faith an offer of composition to his creditors but amends his petition under Sub-section (s), his proceeding must be forthwith dismissed. Because it is only after such an offer has been made and rejected by the creditors that he is authorized to amend under Sub-section (s). In a proper case, where an offer is submitted of a kind which shows that it is only done to perfunctorily satisfy the conditions of the Act, with no expectation that the creditors can, in justice to themselves, give any consideration to it, it will be the duty of the court to refuse to allow the proceeding to be maintained under the further provisions of Sub-section (s)."

See, also, *In re Ballard*, 10 F. Sup. 549, Southern District of New York.

A plan must be actually proposed as a prerequisite for the filing of an amended petition under Sub-section (s). See *In re Vater*, 14 F. Sup. 633, Eastern District of Kentucky.

Moreover, the proposal must be made in good faith. In this connection, the District Court, in its findings, said:

"One of the authorities, speaking with regard to the right of a farmer to advance under subsection (s), says this:

'The Courts have, however, qualified the right of the farmer to advance into (s) merely upon the rejection of a proposal. Perfunctory compliance with the prior subsections is not sufficient to authorize proceedings in (s).' In re Schaeffer, 14 F.

Supp. 807; In re Borgelt, 79 F. (2d) 929; In re Hilliker, 9 F. Supp. 948. 'The farmer-debtor must first have submitted in good faith a valid proposal for the composition and/or extension of his indebtedness, and his failure so to do may be urged by the creditors when the debtor undertakes to amend his petition under (s).' Steverson v. Clark, 86 F. (2d) 330; In re Schaeffer, 14 F. Supp. 807; In re Borgelt, 79 F. (2d) 929; In re Hilliker, 9 F. Supp. 948; In re Vater, 14 F. Supp. 631.

'The requisites for a valid proposal have been expressed variously. In general, it seems clear that a proposal must be definite and unconditional.' In re Buxton's Estate, 14 F. Supp. 616. 'Composition or extension proposal by farmer-debtor that he would pay secured creditors as promptly as loans could be obtained from named bank held insufficient.' Citing In re Schaeffer, 14 F. Supp. 807.

'In re Borgelt, 79 F. (2d) 929 (C. C. A. 7th, 1935) (proposal contingent on loan from Federal Land Bank not valid). It must be feasible and reasonably calculated to effect a debt liquidation. Helbstab v. Equitable Life Assur. Soc. of U. S., 91 F. (2d) 655, 659 (C. C. A. 10th, 1937); In re Duvall, 14 F. Supp. 799 (W. D. Va. 1935); In re Wylie, 16 F. Supp. 193, 1934 (W. D. S. C. 1936); In re Schaeffer, supra; In re Borgelt, supra; In re Siske, C. C. H. 1936 Bankruptcy Law Serv. Sec. 3931 (M. D. N. C. 1936); see also note 6 to Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, 300 U. S. 440 (1937). It has been likewise held that the proposal must be equitable. In re Duvall, supra; In re Vater, supra; In re Schaeffer, supra. It must be submitted promptly. In re Schaeffer, supra; In re Borgelt, supra; In re Sterba, 74 F. (2d) 413 (C. C. A. 7th, 1935).'" (R. 100-101).

"Now, in the Baxter case, decided by the Circuit Court for the Fifth Circuit, to which I referred a moment ago, the Court there, speaking on the matter of good faith in the proposal, said:

'It has been pointed out that good faith in this connection means more than the absence of actual fraud. A bona fide effort to compromise with creditors is made a prerequisite to the relief afforded under subsection (s). * * * The primary purpose of Section 75 is the composition and extension of the debts of distressed farmers. The function of subsection (s) is to provide temporary relief to those who might be able to adjust their difficulties but have failed in the preliminary proceeding. Its presence in the Act has the additional effect of providing an inducement to secured creditors to accept a feasible plan when offered. Thus, its presence in the Act is in aid of the composition provisions, resort to which is made a prerequisite to the relief afforded. It may not be treated as an end in itself, with the other proceedings as mere procedural steps to be taken toward the relief there afforded. It follows that the offer of composition or extension was not made in good faith.'" (R. 101-102).

In *Wright* v. *Mountain Trust Bank*, 300 U. S. 440-470, 81 L. Ed. 736, the Supreme Court of the United States, in an opinion by Justice Brandeis, said, in speaking of the requirements of good faith and for the presentation by the debtor of some plan or proposal for composition or extension:

"This construction is in harmony with the requirement of good faith in the initiation of proceedings under Sec. 75. Relief under Sec. 75 (s) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Sec. 75, (a)-(r). The offer of composition must be in good faith (March 3, 1933, Sec. 75, [c], [i], 47 Stat. at L. 1471, 1472, chap. 204, 11 U. S. C. A. Sec. 203), and if the debtor is beyond all reasonable hope of financial rehabilitation, and the proceedings under Sec. 75 cannot be expected to have

> any effect beyond postponing inevitable liquidation, the proceedings will be halted at the outset. The practical administration of Sec. 75 in the lower courts already affords ample evidence of the substantial protection afforded the creditor by this requirement of good faith in the initiation of proceedings under subsections (a)-(r)."

Therefore, petitioner, John Hancock Mutual Life Insurance Company, respectfully submits that, under the facts as shown by the record in this case, the debtor, Bartels, never did submit to his creditors any feasible or acceptable plan for a composition or extension of his debts. And, under the authorities, it was incumbent upon the debtor to submit such a proposal before he was entitled to proceed under Sub-section (s) of Section 75 of the Bankruptcy Act. Having failed to meet that requirement of the Act, as said by Justice Brandeis, "the proceedings will be halted at the outset." That was precisely what the District Court did in this case by setting aside the debtor's adjudication as a bankrupt and by dismissing his petition.

There Was No Reasonable Hope of the Debtor's Rehabilitation.

The District Court, also, found that there was no reasonable hope of the debtor's rehabilitation; and, in such finding, the court said:

> "Accordingly, the court finds that there is no reasonable probability of the financial rehabilitation of this debtor." (R. 107).

The debtor, Bartels, owned the one hundred acre farm on which the petitioner, John Hancock Mutual Life Insurance Company, holds a first lien securing an indebtedness

now aggregating approximately $9,000.00; and he owned two vacant lots, purchased some twenty years ago, situated in the Mexican section of San Antonio, which lots he had never seen and for which lots he had been unable to obtain any purchase offer. He owned one horse and one milk cow. He owned a tractor which was mortgaged for $500.00 and on which a $250.00 installment payment was past due. He owned an undivided interest in a small stock of groceries of the estimated value of $250.00, which interest he had contracted to sell but has not yet sold. He had no money on hand; and he knew of no place where he could borrow any money. In addition to his lien indebtedness on the farm, he owed unsecured debts aggregating $2,100.00, and those debts were past due. His testimony showed that, over a period of several years, he had been unable to produce from the farm enough revenue to pay interest and taxes thereon, not taking into account his living expenses. (R. 16-19).

In this connection, the District Court said:

> "It is purely speculative as to what can be made on this farm, and we have no better light by which we can guide our feet than the lamp of experience. For a number of years, this farm has not paid any such fanciful returns as some of the witnesses seem to think it should; it has been shown that within the last three or four years, he has not realized more than $300.00 or $400.00 from it. Of course, it has been testified that was because he did not farm it personally; that he has been in bad health. We have no assurance here that conditions in the future will be better than in the past. Assuming that he did make $300.00 to $400.00 from the farm, it would take that much to pay the current interest without making any payments on past due interest. Then we have the matter of operating expenses, living expenses and taxes to be considered." (R. 106-107).

In the case of *Wright v. Mountain Trust Bank, supra,* Justice Brandeis said:

> "It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition at the outset."

Now, in this case, it was amply shown by the record of the proceedings at the first meeting of creditors before the Conciliation Commissioner, and, again, demonstrated in the full hearing before the District Court, that the debtor's financial condition generally was such that there could be no reasonable hope or expectation for his rehabilitation. Indeed, the record shows that this man's financial affairs could not be worked out; that his debts and liabilities far exceeded his assets; and that he was utterly and hopelessly insolvent. In such a situation, delay and postponement in the matter of permitting the creditor to foreclose its lien could only result in loss and detriment to the creditor, with no resulting benefit to the debtor. As well said by the District Court:

> "The debtor's situation was such that there was no reason to believe that he could be rehabilitated, and the bringing of the matter here was simply to postpone the evil day and increase the amount of his indebtedness without accomplishing any good to himself or to his creditors." (R. 99).

CONCLUSION.

Accordingly, it is the contention of petitioner that the District Court rendered the correct judgment and decree in this case, in dismissing the debtor's petition and all proceedings thereunder, and that the judgment and decision of the Circuit Court of Appeals for the Fifth Circuit, re-

versing the judgment and decree of the District Court, is erroneous for the reasons pointed out in this brief.

WHEREFORE, your petitioner respectfully prays that the decree of the United States Circuit Court of Appeals for the Fifth Circuit, whereby the judgment of the District Court in this case was reversed, be reversed by this Honorable Court; that the judgment and decree of the District Court be in all things affirmed; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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Witness the personal signature of

.....

Counsel for Petitioner, John Hancock Mutual Life Insurance Company.

The attorney of record for respondent in this cause is T. E. Mosheim, Esquire, of Seguin, Texas, to whom a copy of this brief has been furnished.

APPENDIX TO PETITIONER'S BRIEF.

APPENDIX "A".

Sub-section (s), Section 75 of the Bankruptcy Act as Amended, (Title 11, U. S. C. A., Section 203 [s]).

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel

or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this title, and may require such payments to be made quarterly, semi-annually, or annually, not inconsistent with the protection of the rights

of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a re-appraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.

(4) The conciliation commissioner, appointed under sub-section (a) of this section, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of this subsection, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such

an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under this subsection, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under this section shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this title. The provisions of this title shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

(5) This title shall be held to apply to all existing cases now pending in any Federal court, under this title, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under this title may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this title shall not be grounds for denying him the benefits of this section.

(6) This title is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided

for and proceed to liquidate the estate. (July 1, 1898, c. 541, Sec. 75; Mar. 3, 1933, c. 204, Sec. 1, 47 Stat. 1470; June 7, 1934, c. 424, Secs. 8, 9, 48 Stat. 925; June 28, 1934, c. 869, 48 Stat. 1289; May 15, 1935, c. 114, Sec. 3, 49 Stat. 246; Aug. 28, 1935, c. 792, Secs. 1-6, 49 Stat. 942-945).

APPENDIX "B".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8758.

In the Matter of JOHN BEVERLY HENDERSON, *Debtor*, PETITION FOR COMPOSITION AND EXTENSION.

In Forma Pauperis.

Appeal from the District Court of the United States for the Eastern District of Texas.

(December 22, 1938).

Before Hutcheson, Holmes, and McCord, Circuit Judges.

HOLMES, *Circuit Judge*:

Appellant, John Beverly Henderson, filed his petition praying that he be allowed to effect a composition or extension under the provisions of Section 75 of the Bankruptcy Act (11 U. S. C. A. 203). At the first meeting of creditors, called by the conciliation commissioner to whom the petition was referred, he proposed a plan of conciliation and extension, but presented no acceptances from any of his creditors and obtained none at that time. No order was entered fixing the time within which a plan might be presented, and the matter lay dormant for sixty-one days, whereupon the conciliation commissioner certified the facts with a recommendation that the petition be dismissed. On the recommendation of the supervising conciliation commissioner, the court entered an order dismissing the petition, no notice of the proposed dismissal having been given to appellant. Thereafter, and within seventy-four days after the first meeting, appellant filed his amended petition for adjudication under Section 75 (S) of the Bankruptcy Act, 11 U. S.

C. A. 203 (S), and, on learning that the original petition had been dismissed, prayed that the order of dismissal be set aside and the case reinstated.

The matter was referred to the supervising conciliation commissioner, who held hearings on the petition and certified his findings of fact and conclusions of law, together with his recommendation that the petition be denied. The court thereupon denied the petition, and this appeal is prosecuted from the order dismissing the original petition and the order denying reinstatement.

No transcript of the testimony heard by the supervising conciliation commissioner is contained in the record, but it appears that his report and findings were adopted by the court. From these findings, it appears that, during the time elapsing between the first meeting of creditors and the filing of the amended petition, appellant took no steps to procure acceptances of the plan offered, except to communicate with one of the twenty creditors affected by the plan. It further appears that the plan offered proposed that, as to nineteen creditors, he be given a three-year moratorium on his debts, including the interest thereon, without subjecting either his person or his property to the jurisdiction of the court, and without applying his income to the payment of rent during the three years, proposing to pay only five per cent interest during the period, a smaller rate of interest than was allowed by law.

In denying the petition for reinstatement, the court found that no good-faith effort to effect a composition or extension had been made, and that appellant was not entitled to the relief provided for in Section 75 (S) of the Bankruptcy Act. *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404.

Appellant challenges the action of the court on the ground that, in the absence of an order limiting the time within which he could present a plan for confirmation, he had a maximum of ninety days, under paragraph 4 of Section L of the General Orders, and that, since this time had not elapsed, the order of dismissal was prematurely entered.

It may be questioned whether or not the debtor can make this contention, since it is implied in the General Orders that such time as is allowed by the court will be on his application, and the absence of such allowance results from an absence of a request therefor; and for the further reason that he is charged with notice of the various steps taken in the proceeding, which includes the reports of the conciliation commissioner and the supervising conciliation commissioner. *Cf. Massey* v. *Farmers & Merchants Nat. Bank*, 94 F. (2d) 526.

In the present case, the finding of the court on the lack of good faith is not questioned, either in the briefs or in the record. The application to the court below for reinstatement of the petition was not that appellant be allowed to make a good-faith offer, but that he be allowed additional delay for the filing of a petition for adjudication under Section S. There is no apparent intention or desire to effect a conciliation or extension, but it appears that appellant's one purpose is to hinder and delay his creditors.

It has been pointed out that the relief afforded in subsection S is not an end in itself, but is ancillary to and in aid of the rehabilitation of distressed farmers, as contemplated under the preceding subsections of Section 75. The constitutionality of the section is grounded upon the principle that proceedings for the conciliation of creditors and the composition and extension of debts are within the scope of the bankruptcy provision of the Constitution. Such a proceeding may not be converted into a sham for the purpose of gaining whatever the petitioner wishes by way of procedural delays and hindrances to creditors, where no legitimate purpose of the act will be served. *Wright* v. *Vinton Branch*, 300 U. S. 440, 462, 57 Sup. Ct. 556, 81 L. Ed. 736; *Steverson* v. *Clark*, 86 F. (2d) 330, certiorari denied, 300 U. S. 666, 57 Sup. Ct. 508, 81 L. Ed. 874; *Knotts* v. *First Carolinas*, 86 F. (2d) 551, certiorari denied, 297 U. S. 706, 56 Sup. Ct. 498, 80 L. Ed. 994; *Baxter* v. *Savings Bank*, 92 F. (2d) 709; *Massey* v. *Farmers and Merchants*, 94 F. (2d) 526, certiorari dismissed on motion of petitioner,

303 U. S. 665, 58 Sup. Ct. 761, 82 L. Ed. 732; *Sheets* v. *Davy*, 97 F. (2d) 674; *Doak* v. *Federal Land Bank*, 99 F. (2d) 145; *Cowherd* v. *Phoenix Joint Stock Land Bank*, 99 F. (2d) 225; *Bender* v. *Federal Farm Mortgage Corp.*, 99 F. (2d) 252.

The judgment of the district court is Affirmed.

APPENDIX "C".

HUTCHESON, *Circuit Judge*, dissenting:

I dissent. Sec. 203 (s) Title 11, U. S. C. A., without exception, limitation or qualification, provides:

> "(s) Any farmer, failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition, and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt."

The majority opinion, on the authority of *Baxter* v. *Savings Bank*, 92 F. (2d) 404, denies this farmer this right.

In *Bartels* v. *John Hancock Mutual Life Insurance Company*, this day decided, the majority is disapproving the holdings in the *Baxter* case, that the right of the farmer to ask to be adjudged a bankrupt under Sec. (s) is qualified by, indeed is dependent upon, whether his proposition for a composition under preceding subdivisions is deemed to have been made in good faith.

For the reasons given in the majority opinion in the *Bartels* case, I respectfully dissent from the opinion of the majority, in this one.

APPENDIX "D".

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8949.

HERBERT B. WILSON, Administrator of the Estate of Modena Lee Wilson, Deceased, Bankrupt, *Appellant*,

versus

ALLIANCE LIFE INSURANCE COMPANY, *Appellee*.

In Forma Pauperis.

Appeal from the District Court of the United States for the Eastern District of Texas.

(March 16, 1939).

Before Sibley, Holmes and McCord, Circuit Judges.

HOLMES, *Circuit Judge*:

This appeal is from an order setting aside a former order of adjudication in bankruptcy under Section 75 (s) of the Bankruptcy Act (11 U. S. C. A. 203 [s]) and dismissing the proceedings, because the petition was not filed in good faith and there was no hope of rehabilitation.

During her lifetime, appellant's intestate filed her petition to effect a composition or extension of her debts, and submitted her offer at the first meeting of creditors. The offer being refused, she filed her amended petition under Section 75 (s), praying to be adjudicated a bankrupt and afforded the relief therein provided. The order of adjudication was regularly entered, and proceedings for the collection of debts and enforcement of liens were stayed in accordance with the procedure prescribed in the act. Thereafter, the bankrupt died, and appellant, having qualified as administrator, petitioned to be allowed to proceed in behalf of her estate. Appellee entered its appearance in opposition to appellant's petition, alleging that the order of adjudication was improvidently entered; that no offer of composition had been made in good faith prior to adjudication; that no feasible plan of liquidation had been submitted with the offer; that there was no reasonable hope of rehabilitation; that the land upon which appellee held a lien constituted the corpus of the estate and was worth less than the amount of

the lien, leaving no equity for the estate; and prayed that the order of adjudication be set aside and the case dismissed.

On a reference to the Supervising Conciliation Commissioner, a hearing was had, after which the Commissioner found that the proposed plan of composition and extension was not made in good faith; that neither the bankrupt nor appellant had any feasible plan of rehabilitation; and that the amount of the debt to appellee was in excess of the value of the security, whereby further administration would be of no benefit to the estate. The court adopted the report of the Supervising Conciliation Commissioner, set aside the order of adjudication, and dismissed the proceeding. Relying principally upon the case of *Benno Bartels* v. *John Hancock Insurance Co.*, 100 F. (2d) 813, appellant prosecutes this appeal.

On the ground that the appeal was perfected under Section 24 (a) of the Bankruptcy Act (11 U. S. C. A. 47 [a]), whereas it should have been under Section 24 (b) (11 U. S. C. A. 47 [b]), appellee moves to dismiss the appeal. Since the record is sufficient to present questions of law which are determinative of the controversy, the motion to dismiss will be overruled, and the appeal will be allowed as if brought under Section 24 (b) for the consideration of the questions of law only. *Baxter* v. *Savings Bank of Utica*, 92 F. (2) 404, 405, and cases cited.

Accepting the finding that the offer was not made in good faith and that there is no reasonable hope of rehabilitation, as we must on this appeal, appellant's contention is reduced to the proposition that the district court was without authority to set aside the adjudication and dismiss the proceeding, but was bound to continue the stay provided for or to liquidate according to the procedure and subject to the limitations provided for in the act. Following what we conceive to be the correct interpretation of the case of *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. U. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, we have held that good faith and a reasonable hope of rehabilitation in the proceedings leading to, as well as in making, the offer of

composition and extension under Section 75 of the Act (11 U. S. C. A. 203 [a]-[r]) are necessary prerequisites to the benefits provided under subsection (s) (11 U. S. C. A. 203 [s]). *Baxter* v. *Savings Bank of Utica, supra*, 92 F. (2), 404, 406; *In re John Beverly Henderson*, 100 F. (2) 820.

As to the contention that the authority to dismiss does not exist in the district court, because not expressly conferred by the act, it should be noted that the general bankruptcy act contains no provision authorizing a dismissal for fraud or lack of jurisdiction. It is true that the bankruptcy court is limited in its jurisdiction, being created by statute; but, even so, it is a court of equity, within its sphere, and may protect itself from being used as an instrument of hindering and delaying creditors when the debtor, in filing the petition, was acting in bad faith and without hope of rehabilitation. To let the adjudication stand in such circumstances would be to sanction the continuation of an unwarranted imposition upon the jurisdiction of the court.

Furthermore, the petition to be adjudged a bankrupt under 75 (s) is merely an amendment to the prayer of the petition for a composition and extension under 75 (a)-(r), as to which there is express statutory authority to dismiss because not filed in good faith. The argument of appellant is reduced to this: that, although there is statutory authority to dismiss the original petition for lack of good faith, this authority is lost when the prayer of the petition is amended by asking to be adjudged a bankrupt, even though the prayer is amended under a separate paragraph of the same act.

Added to the principle that the law will not do an idle thing, we have, then, to support the action of the court in dismissing the petition and amendment thereto: 1, the inherent power of a court of bankruptcy to protect its jurisdiction from abuse; 2, the express statutory power to dismiss the original petition under Section 75 (a)-(r) for lack of good faith, the prayer only of the petition being amended under paragraph (s); 3, the construction of the act by the supreme court in *Wright* v. *Vinton Branch, supra*, upholding its constitutionality on the ground that the bankruptcy

court has the power to put an end to the proceedings, if not filed in good faith; 4, the opinion of Mr. Justice Brandeis, that relief under 75 (s) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Section 75 (a)-(r), followed by his statement that "if the debtor is beyond all reasonable hope of financial rehabilitation, and the proceedings under Section 75 cannot be expected to have any effect beyond postponing inevitable liquidation, the proceedings will be halted at the outset." 300 U. S. 462. If further implication of power is needed, it is found in 75 (i), which provides that the court shall confirm the proposal if satisfied that the offer and its acceptance are in good faith.

The judgment of the district court is Affirmed.

APPENDIX "E".

SIBLEY, *Circuit Judge*, concurring:

In the case of John Beverly Henderson, 100 F. (2d) 820, the farmer-debtor under Sect. 75 of the Bankruptcy Act had not been adjudicated a bankrupt. In the case of Benno Bartels, 100 F. (2d) 813, he had been adjudicated. The present case falls directly under the latter decision, for Modena Wilson had been adjudged a bankrupt for about two years when the secured creditor on motion got a revocation of the adjudication and a dismissal of the proceedings. I persist in thinking the exposition of the law in the Benno Bartels case to be correct. Section 74 and Section 75 are not to be construed together as composite legislation. Each is a separate scheme to be distinguished from the other. In Section 74 any person not a corporation, whether in or out of bankruptcy, may petition in good faith and obtain the provided relief. Subsection (1) provides for an adjudication in bankruptcy of the debtor if the proceeding was commenced or prolonged for the purpose of delaying creditors or delaying an adjudication, or if confirmation of his proposal is denied, except that in the case of a farmer he must consent to adjudication. Section 75 sets up a more

elaborate organization, including conciliation commissioners, and it applies only to farmers. It contains several provisions which are repetitions of what was enacted in Section 74, but this only shows that the two are independent of one another and one includes nothing merely because it is in the other. Under Section 75 the farmer-debtor who fails to obtain the consent of his creditors to his plan of extension is not liquidated as of course, as the debtor under Section 74 (1) is, but Subsection (s) permits him without any conditions whatever to amend his petition and ask to be adjudged a bankrupt. When that is done he is a voluntary bankrupt, and comes under the general bankruptcy law, except as Subsection (s) has modified it. The main modification is that instead of surrendering all his property at once he may on request keep it upon terms fixed and supervised by the court for three years, with a view of rehabilitating the farmer as such. He is still a bankrupt during the effort at rehabilitation. If he fails to keep the terms or it appears that he will not be able to refinance himself in three years, or if rehabilitation fails because secured creditors pursuing their rights take the farm away, the rehabilitation of course fails, but the farmer is still in voluntary bankruptcy. A secured creditor cannot dismiss the proceeding on motion or set aside the adjudication. His right is, on sufficient grounds, to have his security abandoned to him if there is no equity for the estate, or to have the court sell it for him, or permit him to foreclose. The farmer and his other creditors are entitled to go ahead in bankruptcy on this adjudication, and the bankruptcy case can be dismissed only after notice to creditors. As in the Benno Bartels case, so in this, the secured creditor, while he might have asked a release or a sale of his security by the court for the reasons he urged, had no standing to have the adjudication set aside and the case dismissed.

Nevertheless, in the circumstances here disclosed, this erroneous action did no one any harm. The secured creditor gets opportunity to foreclose on his security. There is no equity in it and no other estate, and no possible benefit to the slight unsecured indebtedness in continuing the bank-

ruptcy. The debtor herself was dead and a discharge would do her no good. While the regular course would have been to abandon the farm to the secured creditor, and to close the estate without a trustee because there are no assets, the course taken accomplishes the same thing. Because no injury was done anyone I concur in affirming the judgment.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 33

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

BENNO BARTELS.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

T. E. Mosheim,
Elmer McClain,
William Lemke,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 33

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

BENNO BARTELS.

BRIEF FOR RESPONDENT.

Statement of the Case.

On December 2, 1937, Benno Bartels, the respondent, being unable to meet his obligations as they matured, filed his petition with the District Court for an extension of time under the provisions of Section 75 of the Bankruptcy Act as amended. The petition was granted and the case referred to the conciliation commissioner (R. 2).

On December 21, 1937, at a creditors' meeting duly called, the respondent, Benno Bartels submitted a proposal for *payment and* an extension of time. All of the creditors present agreed to the extension except the appellant, the majority *in amount* creditor, the John Hancock Mutual Life Insurance Company (R. 3, 4 and 56).

After having failed to get the consent of a majority in amount of his creditors, the respondent, Benno Bartels, amended his petition, asking to be adjudged a bankrupt, under subsection (s) of said Section 75 as amended. On January 10, 1938, the court entered its order adjudging the respondent a bankrupt and appointed a referee (R. 4, 5, 6 and 7).

Thereafter the debtor's petition was dismissed by the District Court on motion of the John Hancock Mutual Life Insurance Company, but upon reconsideration the court reinstated the petition. Thereupon, in accordance with the suggestion of the District Court, the John Hancock Mutual Life Insurance Company made a motion to set aside the order of adjudication and to dismiss the debtor's petition, which motion the court granted (R. 7, 8, 9, 10, 11, 12, 13, 14, and 99).

From the District Court's order of dismissal the respondent, Benno Bartels, appealed to the Circuit Court of Appeals of the Fifth Circuit, which court reversed the District Court. The case is now before this Court on an appeal by the John Hancock Mutual Life Insurance Company.

The respondent, Benno Bartels, is the owner of 100 acres of improved farm land in Guadalupe County, Texas. On this land he has a modern home and other buildings necessary to operate the farm as a going concern. He paid $200 an acre, or $20,000, for this farm. Under present conditions this farm is conservatively valued at $100 an acre, or $12,000 (R. 8, 31, 71, 72, 95 and 96).

On this farm the John Hancock Mutual Life Insurance Company has a first mortgage, on which there is due $8,195.37. This includes the surprising amount of $745.03 attorneys' fees (R. 9). The respondent also owns two lots in San Antonio, Texas, for which he paid $510, and which he values at $500. These lots are free from encumbrances (R. 47).

The respondent is also the owner of household furniture, a Chevrolet automobile, a tractor and other farm equipment. There is something over $1,800 due him on account from other parties (R. 47, 48, 57 and 62). His total indebtedness other than that due to the John Hancock Mutual Life Insurance Company is $2,100 (R. 3).

According to the Agricultural Agent for Guadalupe County, the soil of this farm is the most fertile in Guadalupe County. Mr. Bartels complies wth the Program of the Agricultural Extention Department of the A. and M. College. He uses a tractor and raises corn and cotton as his principal crops. He had 120 Barred Rock hens, 150 to 200 baby chicks, a brood sow and three other hogs, two cows, an orchard of peaches and plums and some pecan trees. The Agent feels that the income from the farm should be in the neighborhood of $100 a month (R. 73, 74, 75, and 84).

Mr. Bartels proposed to pay all of his creditors in full, but asked for an extention of time in which to meet his obligations (R. 49). He proposed to sell the San Antonio lots and apply the proceeds and $200 that he expected from the sale of his interest in a store, together with what he could collect out of $1,500 of accounts due him from others, to the John Hancock Mutual Life Insurance Company, but it declined the proposal (R. 56, 57, 65, 66, and 67).

The evidence shows conclusively that Mr. Bartels acted in good faith. There is not one syllable anywhere in the record that Mr. Bartels was acting in bad faith. In fact the record is replete in showing that he is an honest, hard working, conscientious person who wishes to pay his debts in full (R. 49 to 66, inclusive).

The District Court set aside the adjudication under Section 75 (s) and dismissed the debtor's petition. This principally because the court concluded that the debtor could not be rehabilitated, and therefore acted in bad faith. The

court held that good faith meant more than the absence of actual fraud. After having thus held that good faith could be bad faith, the court held that a *bona fide* effort to compromise with creditors is made a prerequisite to the relief afforded under Section 75 (s). The District Court below cites authority for its erroneous decision, but fails to point out wherein Section 75 gives it or any other court such authority (Opinion of the District Court, R. 99 to 108, inclusive).

Question Involved.

The principal and ultimate question involved in this case is whether the intent of Congress, as expressed in unambiguous language, is to control, or whether some District Courts can so disregard or misconstrue and twist the language as to defeat the clear intent of Congress. In other words, the question is whether lower courts may, by judicial legislation, annul an Act of Congress that they do not agree with, although the Act has been held constitutional by this Court. There is no room for construction in the case at bar. The language in Section 75 speaks clearly for itself on the issue here involved.

The question is not what some of the District Courts have attempted to read into the Act but what the Act itself says. There is no need of searching books to find what the Act means. Its terms are *unambiguous and clear.* Whether the Act is wise or unwise is the *responsibility of Congress, not* of the District Courts. Their duty is to give full force and effect to the Act so as to carry out the evident intent of Congress.

Statute Involved.

The statute involved is Section 75 of the Bankruptcy Act. The District Court below set aside the adjudication and dismissed the farmer-debtor's petition for reasons stated above. The Circuit Court of Appeals of the Fifth Circuit

reversed the District Court's decision. We feel that the *mere reading* of those portions of Section 75 that are involved in this case will satisfy this Court that the reasoning and the decision of the Circuit Court below, when it reversed the District Court, is correct.

The applicable portions of Section 75 are here set forth:

Bankruptcy Act, Section 75, U. S. C., Sup. 4, Title 11, Section 203, subsections (c), (g), (n), (p) and (s).

"(c). *At any time* prior to March 4, 1940, a petition may be filed *by any farmer*, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. . . .

. . . . . .

"(g). An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing, *by a majority in number* of all creditors whose claims have been allowed, including secured creditors whose claims are effected, which number shall represent *a majority in amount* of such claims.

. . . . . .

"(n). The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under this section, *shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court,* including all real or personal property, or any equity or right in any such property, . . .

. . . . . .

"(p). *The prohibitions* of subsection (o) *shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to*

all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor-farmer's creditors, as provided for in this section.

* * * * * * *

"(s). *Any farmer failing* to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or *if he feels aggrieved* by the composition and/or extension, *may amend his petition* or answer, asking to be adjudged a bankrupt. *Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property* wherever located, whether pledged, encumbered, or unencumbered, *be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession,* under the supervision and control of the court, *of any part or parcel or all of the remainder of his property, including his encumbered exemptions,* under the terms and conditions set forth in this section. *Upon such a request being made, the referee,* under the jurisdiction of the court, *shall designate and appoint appraisers,* as provided for in this Act. *Such appraisers shall appraise all of the property of the debtor,* wherever located, *at its then fair and reasonable market value. The appraisals shall be made in all other respects* with rights of objections, exceptions, and appeals, *in accordance with this Act:* Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1). *After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his* unencumbered *exemptions,* and his unencumbered interest or equity in his exemptions, as prescribed by

the State law, *and shall further order that the possession,* under the supervision and control of the court, of any part or parcel or all of the remainder *of the debtor's property shall remain in the debtor,* as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2). *When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings* in any court, or under the direction of any official, against the debtor or any of his property *for a period of three years. During such three years the debtor shall be permitted to retain possession* of all or any part of his property, in the custody and under the supervision and control of the court, *provided he pays a reasonable rental* semi-annually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of *such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property.* Such rental shall be paid into court to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors and applied on their claims, as their interest may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, *may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations* of the debtor, such sale to be had at private or public sale, and *may,* in addition to the rental, *require payments on the principal due and owing by the debtor* to the

secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semi-annually or annually, not inconsistent with the protection of the rights of the creditors, and *the debtor's ability to pay, with a view to his financial rehabilitation.*

(3). *At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession,* including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on the principal: *Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal* of the debtor's property, or in its discretion, set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, *and the debtor shall then pay the value so arrived at into court, less payments made on the principal,* for distribution to all secured and unsecured creditors, as their interests may appear, *and thereupon the court shall,* by an order, *turn over full possession and title of said property, free and clear of encumbrances to the debtor:* Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum, interest, into court, and he may apply for his discharge, as provided for by this Act. *If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.*

(4). * * * *If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged*

a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession and the property returned to the possession of such farmer, under the provisions of this Act. * * *

(5). This title shall be held to apply to all existing cases now pending in any Federal court, under this section, as well as to future cases. *All cases* under this section *that have been dismissed* by any conciliation commissioner, referee, or Federal court because such Court erroneously assumed or held that subsection (s) of this section was unconstitutional, *shall be promptly reinstated,* without any additional filing fees or charges. *Any farm debtor* who has filed under the General Bankruptcy Act *may take advantage* of this section upon written request to the court; and a *previous discharge* of the debtor under any other section of this title *shall not be grounds for denying him the benefits* of this section.

Argument.

At the outset we feel that it is our duty to inform the Court that Congressman Lemke appears in this case as one of the attorneys for the respondent without compensation, the same as he has done in every other case that he participated in before this Court. He does so as a public servant, feeling that Acts of Congress should be respected and uniformly enforced by all the District Courts.

History.

Section 75 of the Bankruptcy Act was originally passed in the closing days of the Hoover Administration, in March, 1933. The present Frazier-Lemke Amendments were added and became a law on August 28, 1935. Contrary to the general belief, the Frazier-Lemke Amendments did not only add subsection (s), but also amended existing subsections (b), (j), (k), (n) and (p) of Section 75, as well as adding subsection (s).

Subsection (r) was later amended by another Act because of too strict a construction by some District Courts as to what constituted a farmer. Other amendments have since been made, and there is another amendment, (S. 1935), pending before Congress, which has already received the approval of the Judiciary Committee of the Senate.

Provisions Mandatory.

The provisions of subsection (s) *are mandatory*, and while the *stay of three years is not absolute, the statute itself provides the exception. No court has authority* to dismiss the debtor's petition *because his liabilities exceed his assets*, or because it, the court, concludes that the debtor cannot be rehabilitated, and that, therefore, his petition is in bad faith. *To do so is reading something into the statute that is not there.* It is judicial legislation. In such a case the bad faith is not with the debtor but is elsewhere.

In re Chicago, Rock Island & Pacific Ry. Co. (7 C. C. A.), 72 F. (2d) 443, the court said:

> "Congress having the express authority to enact legislation on the subject matter of bankruptcy, was the sole judge of the means and their appropriateness to the purpose of the legislation so long as said means did no violence to the Constitution."

The farmer-debtor *has an absolute legal right* to file his petition under Section 75 (c), and if a majority of the creditors in number and amount refuse to agree to a composition or extension of time then he *has an absolute right* to ask to be adjudicated a bankrupt. *No court may deny him that right or dismiss* his petition *without his consent* (75s).

Of course we concede that a court of equity can dismiss a petition for abandonment, want of prosecution or proven fraud, *not assumed bad faith*, or where the petitioner is not a farmer within the meaning of the statute. These are the

only exceptions and the court may do this under its general equitable power. This is a power that the courts have always, and can, exercise even though Section 75 is silent on the subject. But in bankruptcy cases courts *do not usually dismiss petitions.* They *wind up the estate and liquidate it.*

Section 75 of the Bankruptcy Act deals with *Agriculture.* It is *not a part* of Sections 74, 77 or 77 (b). These Sections have been dealt with *separately and differently. Separate* and *independent hearings* have been held on them by the Judiciary Committees of both the House and the Senate. These Sections deal with *different subjects—with different types of corporations, organizations, persons and property.* No court is justified in using part of the language of Sections 74, 77 or 77 (b) as if it were part of Section 75.

Unfortunately, some courts have assumed that the language used in Sections 74, 77 and 77 (b) was part of Section 75. Under Sections 74, 77 and 77 (b), good faith, lack of fraud, etc., are made the basis of the proceeding. In these Sections Congress gave the court discretionary power *that it denied* the court in *Section 75.* The hostility with which Section 75 has met is ample proof that Congress knew what it was doing when it made the provisions *more mandatory* than in the other Sections.

> "The sale contemplated by Section 75 (s)-3 *is authorized only at the end of the moratorium period.* A petition to dismiss the proceeding, and another to dissolve the injunction against the foreclosure of the mortgage, have been denied by one of my colleagues; and the section of the Act under which the proceeding was instituted has provided no distinct method of disclaimer on the part of the court." *In re McIntyre,* 23 Fed. Supp. 342.
>
> "Section 75 (s) (3) fails to disclose any authority in this court to dismiss this proceeding or to strike from

the schedule the lands involved, were it established that the debtor will be unable to refinance himself within three years." *In re Lines*, C. C. H. 51, 605.

Never Too Poor For Bankruptcy.

Surely, it is ridiculous to say that a farmer *is too poor* to go through bankruptcy or to take advantage of the benefits of Section 75. There is no room for even a difference of opinion here. If the District Court below had only carefully read Section 75, it would have seen the untenableness of its position. To say that the farmer debtor cannot take advantage of this Act because his liabilities exceed his assets *and therefore he has no financial equity*, or because the court thinks he cannot be rehabilitated is *to do violence to the language of the Act. Congress decided that question. It is not for the courts.*

The Act specifically *states* that an appraisal is to be made of all of the farmer's property "*at its then fair and reasonable market value.*" That is to say that the reasonable market value *fixes the debtor's assets and also the limit* of his liabilities. That is the rule in all bankruptcy proceedings as far as liabilities are concerned. *It is not what* the bankrupt *owes but* what the property *brings* that finally settles the question of assets and liabilities, and balances the debit and the credit sides of the ledger. This via a discharge.

It then *provides* that *the farmer is* to remain in *possession for a period of three years* and pay the "usual and customary rental," on the *appraised* value, which rental is to be fixed by the court, and it provides further that if it becomes necessary, to protect the creditors, the court may require additional payments, according to the *debtor's ability to pay* with a *view to his rehabilitation. Nowhere does the Act provide* that the District Court may shirk its duty and responsibility, *and dismiss the proceedings.*

If any further proof is required to show that Congress intended that the farmer debtor's liabilities should be limited to the reasonable market value of his property "the same as in general bankruptcy proceeding" then let us cite Section 75 (k):

> "(k) * * * Provided, however, That such extension and/or composition shall not reduce the amount of or impair the lien of any secured creditor *below the fair and reasonable market value* of the property securing any such lien at the time that the extension and/or composition is accepted, *but nothing herein shall prevent the reduction* of the future rate of interest on all debts of the debtor, whether secured or unsecured."

The court will notice that the Act protects the creditors *up to the fair and reasonable market value* of the property at the time the extension and composition is accepted. The court will note that it provides further that the rate of interest *may be reduced* on that fair and reasonable market value on all debts of the debtor, whether secured or unsecured. There is *no suggestion* that the *unfortunate bankrupt farmer is to pay all of his obligations in full.* The intent of Congress *is clearly to the contrary.* It intends that a debtor give *all that he has, and no more.* That is as true under Section 75 as under General Bankruptcy.

In Section 75 (n) the intent of Congress is too clear for dispute. Congress intends to protect the farmer debtor in his possession and in his property until a composition and extension has been agreed upon, or until he files his Petition in Bankruptcy under Subsection (s). The language is so clear that we fail to understand how the District Court could misconstrue it. May we also call this Court's attention to the fact that the Act provides specifically that the procedure shall be the same as if a voluntary petition in General Bankruptcy had been filed.

Whoever heard of a court *dismissing* a voluntary petition *because* the bankrupt had *no equity* left in his property—*because* his *liabilities exceeded his assets*, or because the bankrupt was *unable to pay his debts in full*, or *too poor* to go through bankruptcy. Such a suggestion would be considered absurd, and it is *equally absurd* under Section 75.

Cannot Surrender Jurisdiction.

Again the court will note that in subsection (p) Congress intended to have all of Section 75 apply to *all debts, public and private*, and to *all the debtor's property*. It placed all the debtor's property under *the sole jurisdiction and control* of the court. The District Court does violence to the language in this paragraph when it dismisses the action, and attempts *to surrender its jurisdiction and control*.

> "For the court to afford the relief which the section as amended contemplates, it is necessary that the *exclusive* and *paramount jurisdiction* of the court *over* the *property* of the bankrupt *be maintained*; and there can be no question but that the provisions of subsections (n) and (o) apply as well to proceedings continued under subsection (s) as to proceedings under the other provisions of section 75. * * * And we do not think that the right to stay proceedings in the State court is precluded because a sale has taken place in foreclosure proceedings if there has been no confirmation of the sale." *Bradford* v. *Fahey*, 76 F. (2d) 628 (C. C. A.-4th).

When a farmer debtor comes into a Court of Bankruptcy, he comes into a Court of Equity. He *has a legal right* to ask for *a three year period* in which to refinance himself upon paying a reasonable rental and complying with other lawful orders of court. This *right* the District Court *may not deny him*. The court cannot escape the duties placed upon it by the Act, by dismissing the case.

> "Upon adjudication of bankruptcy, title to all the property of the bankrupt, wherever situated, vests in

the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction, and that court's possession and control of the estate cannot be affected by proceedings in other courts, State or Federal. Isaacs *v.* Hobbs Tie & T. Co., 282 U. S. 734, 737, and cases cited. Such jurisdiction having attached control of the *administration of the estate cannot be surrendered even by the court itself. Id.*, 739. *'The filing of the petition is a caveat to all the world and in fact an attachment and an injunction.'* May *v.* Henderson, 268 U. S. 111, 117." *Gross* v. *Irving Trust Co.*, 289 U. S. 342.

Section 75 (s).

This section seems to have been the stumbling block of some District Courts. *Every conceivable* attempt has been made *to destroy its effectiveness.* Yet, there is nothing new in this section. It simply applies old and well understood principles of law to Agriculture. These principles have been employed for years to industry under receiverships, trusteeships and bankruptcy. While this section has saved hundreds and thousands of homes *many more* could have been saved if all the District Courts had *entered into the spirit of the Act.* This would have been of great benefit, not only to the nation, but to the creditors as well as to the farmer debtors.

In the *Bradford* case, 76 F. (2d) 628, Judge Parker of the Circuit Court of Appeals Fourth Circuit says:

"As a matter of fact, no property in any real sense is taken from the lienholder by reason of the provisions of the act. The mortgaged property has already shrunk in value before the proceedings under the act are instituted; and the proceedings merely scale down the secured portion of the debt to the value of the encumbered property and transfer the lien of the encumbrance to the proceeds of that property when paid into court. While the lienholder is delayed in getting his money, the delay is probably not for so long a time, or the loss

> so great, as would result to him if the act were not passed and wholesale foreclosures of real estate mortgages should result."

In the *Radford* case, 8 F. Supp. 489, Judge Simon of the Circuit Court of Appeals Sixth Circuit says:

> "It is true that the appellant will not be able to collect the face value of its mortgages, nor the accrued interest thereon. But this is a loss it has already sustained, not through the operation of the statute, but through the default, insolvency and bankruptcy of its debtor."

Surely, it does violence to the language of subsection (s) to hold that a court may dismiss the *petition* without liquidating the estate as provided for in this subsection. The very first sentence of subsection (s) says that *any farmer may ask to be adjudged a bankrupt.* This in case he *fails* to get the consent of a majority in number and amount of his creditors to consent to a composition and extension of time, or if he feels *aggrieved* by the composition or extension. It is not for the court to determine that question. Neither is it within the discretion of the court. *The farmer may—and the court must.*

Again, *the farmer may ask* that all of his property be appraised and his exemptions set aside to him and *he may ask that he be allowed to retain possession,* under the control of the court, of all or any part of the remainder of his property. *No room for dismissal here.* The provisions are *mandatory* upon the court to supervise and control the property.

Again, subsection (s) provides that the appraisers shall appraise all the debtor's property *"at its then fair and reasonable market value."* Congress *does not say* that the debtor *must pay all* of his debts. It says that he must pay

all of his debts *as far as the value of his property will pay them.*

Paragraph number (1) of subsection (s) is *mandatory,* and says the Referee *shall* issue an order setting aside to such debtor his exemptions and equity in exemptions, and *shall* further order *the possession* under the supervision and control of the court of any or all of the remainder of the debtor's property *to remain in the debtor. These provisions are clear and mandatory.* The court must perform the duties imposed upon it by Congress. The farmer debtor has a right to go through bankruptcy as provided for in Section 75.

In paragraph number (2) under subsection (s), the Act provides that *when* the conditions set forth *in Section 75* have been complied with, the court *shall—not may—stay all* judicial or official proceedings in any court or under the direction of any official *against the debtor* or *any of his property for a period of three years.* It provides that during such three years, the debtor shall be permitted to retain possession of all or any part of his property, provided he pays a reasonable rental, fixed by court.

This three year stay *does not require* that the farmer debtor's assets *exceed* his liabilities, or that he have an equity in his assets *over and above* his liabilities, or that he *convince* the court that he *can pay all* of his debts *within three* years, or that the court *without* evidence, except that it feels so inclined, *can say that he acted in bad faith.* No, the stay is *predictated* upon his *paying* the *rental* fixed by the court.

If the farmer debtor fails in the payment of the rental, or in the payment of additional amounts as ordered by the court, or disobeys orders of the court, abandons the property, or commits waste, *then* and then *only* may the

court liquidate the estate, in accordance with the provisions of this Section.

The provisions in this paragraph are mandatory on the part of the court. The farmer may not wish to select all of his property or any of it, but if he does, and pays the rental and complies with the other orders of the court, *then* the court *may not dismiss* the petition. In this paragraph are set forth the requirements of the debtor, and also the duties of the court.

Nothing in this paragraph, or any other, *permits* the court to *dismiss* the petition by saying that in its opinion the farmer is *not able* to rehabilitate himself. The test *of rehabilitation is his ability to pay the rental on the present value of the property.* The test *is not* whether he can pay his debts *in full. Nor yet* whether he owes *more than* he has assets.

Under this paragraph, the court may require additional rental, or payments on the principal, but such requirements must be made *not inconsistent* with the rights of the creditors and *the debtor's ability to pay with a view to his financial rehabilitation.* In other words, the court is to pass upon the *debtor's ability to pay* additional rental, but it is *not* to pass upon the *farmer debtor's right* to go through bankruptcy, *that right is given him by statute.*

Paragraph number (3) of subsection (s) provides that at the *end of three years,* or sooner, the debtor may pay to the court *the amount of the appraisal* of the property of which he retains possession, less the amount paid on principal. This provides that the debtor may shorten the period of three years by paying before the expiration. That is, if he is able to be refinanced before. It does *not* give to the court the right to shorten the period. That decision *rests with the farmer.*

It is true that whenever the farmer is ready to pay up to the value of the property, either he or the creditors may

ask for a reappraisal, or the court may set a date for a hearing to fix the then value of the property. But there is nothing in this Section that assumes that the farmer debtor is to pay *more than the value of the property* at the time when he is ready to pay.

It is also true that the Act provides that upon written request, any secured creditor or creditors, may ask that the property on which they have a lien be sold at public auction. But it is a *violent assumption* to assume that any creditor *would bid more* than the property is worth.

Any creditor bidding *more* because of vengeance, *would be guilty of bad faith,* and the court of equity should in such a case refuse to *confirm* the sale. By inserting this provision in the Act, Congress intended to protect the creditor or creditors, but it *did not intend* to give them an instrument *for vengeance* with which *to destroy a home.* No *decent* creditor would think of such a thing.

This paragraph then provides how the court *may liquidate, not dismiss,* the farmer's estate, if he at any time fails to comply with the provisions of Section 75 or with any orders of the court made pursuant to this Section, or if he is *unable* to refinance himself *within three years.*

Justice Brandeis' Opinion.

It was these provisions, under which the District Court may cut the stay short of three years and liquidate the farmer debtor, that Justice Brandeis had in mind when he said in the *Robert Page Wright* case that the stay was not absolute. We quote from the opinion:

> "Whether, in view of the emergency, an absolute stay of three years would have been justified under the bankruptcy power, we have no occasion to decide. There are other provisions in the statute affecting the mortgagor's right to possession" (300 U. S. 440).

No amount of attempted misinterpretation of Judge Brandeis' opinion in the *Robert Page Wright* case can overcome the logic set forth in his opinion and in subsequent opinions of this Court. We shall discuss these decisions further when we answer the appellant's specifications and assignments of errors.

The paragraph numbered (4) of subsection (s), there is very little that has any bearing upon this case, except that part which says that "if at the time the farmer debtor amends his petition or answer asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver *shall be divested of possession* and the property *returned to the possession of such farmer*, under the provisions of this Act."

This clearly indicates that the provisions are mandatory, and that the court *cannot dismiss* the petition. It shows clearly *that Congress intended* that the farmer should remain in *possession undisturbed for a period of three years*, provided he pays the rental and otherwise complies with the order of the court, and complies with the other provisions of the Act.

There is nothing of importance in paragraphs numbered (5) and (6) of subsection (s), except that it further carries out our contention that the court cannot dismiss or deny to farmer debtors the right to go through bankruptcy because *they are too poor*, or because *their assets do not equal their liabilities*, or that the court in its discretion may determine that a farmer *cannot* be rehabilitated within three years, or that he is *unable* to be refinanced, or is *unable* to pay the *value* of the property *within three years*.

Such is an arbitrary assumption, unwarranted by anything in Section 75. It is an abuse of discretion. We repeat that the stay of three years is not absolute, but Section 75

itself provides the conditions under which it can be terminated, *not by dismissal* but *by liquidation* of the estate.

"When a statute is plain and unambiguous in its terms and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom, but must enforce the law as they find it. If the meaning of a statute is plain, and its provisions are susceptible of but one interpretation, its consequences, if objectionable, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action; the wisdom or policy of the law, the motives that prompted its enactment and the reasonableness or justice of its provisions cannot be taken into consideration by the courts in construing the statute." And cases there cited, 25 R. C. L., Statutes, § 255.

"The liberal rule of construction only requires that a statute be so enforced as to carry into effect the will of the legislature as expressed in the terms thereof, and to give, not stintedly or niggardly, but freely and generously, all the statute purports to give. It does not, however, warrant an extension of the statute to the suppression of supposed evils or effectuation of conjectural objects and purposes, neither referred to nor indicated by any terms used not clearly within the spirit of the legislation." And cases there cited, 25 R. C. L., Statutes, § 298.

"Statutes must have a rational interpretation, to be collected not only from the words used, but from the policy which may be reasonably supposed to have dictated the enactment, and the interpretation should be rigorous or liberal, depending upon the interests with which it deals. * * * A remedial statute must be construed liberally so as to afford all the relief within the power of the court which the language of the act indicates that the legislature intended to grant." And cases there cited, 25 R. C. L., Statutes, Section 299.

Answering Appellant's Specifications.

We shall now briefly answer each of appellant's six specifications of assigned errors. We shall also answer the arguments made by appellant under each specification.

First and Fourth.

For the purpose of brevity we shall answer appellant's first and fourth specifications together, because they both claim that the decision of the Circuit Court below is in conflict with the decision of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank* (300 U. S. 440).

Answer, Nothing could be further from the fact. The truth is that the decision of the Circuit Court of Appeals below is in harmony with the decision of this Court in the case of *Wright* v. *Vinton Branch Bank.* The court correctly construed, interpreted and applied the statute in accordance with the construction, interpretation and application made by the Supreme Court of the United States in the *Wright* case. In the *Wright* case *the farmer debtor owed $6,559.50 and his assets were only $2,828.52.* In the present case the *farmer debtor owes $8,195.37* and his assets, including personal property, *are in the neighborhood of $15,000* (R. 71 to 90, inclusive, and R. 95 and 96).

We again quote from Justice Brandeis' opinion:

> "Whether in view of the emergency, an absolute stay of three years would have been justified under the bankruptcy power, *we have no occasion to decide. There are other provisions in the statute affecting the mortgagor's right to possession.* • • • But we are of the opinion that, while the Act affords the debtor, *ordinarily, a three-year period of rehabilitation,* the stay provided for is not an absolute one; • • •"

Again:

"The mortgagor's right to retain possession during the stay is specifically limited by paragraph 3, which provides:

"'If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.'

"Thus, for example, the debtor's *tenure* under the stay *is subject to the requirement that he pay 'a reasonable rental* semi-annually for that part of the property of which he retains possession.' Under the last-quoted provision of Paragraph 3, if the debtor defaults in this obligation 'at any time,' the court may thereupon order the property sold."

Justice Brandeis then recites Paragraph 2 of 75 (s) which provides that the court, in addition to the rental, may require payments on the principal due and owing to the creditors, and then says:

"Paragraph 3 authorizes the court to have the property sold if 'at any time' the debtor should fail to comply with orders of the court issued under its power to require interim payments on principal, or otherwise in the course of its 'supervision and control' of his possession."

Again the able justice says:

"This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period."

But here the justice is discussing the *limitations and restrictions* of the Act. He is *not sanctioning arbitrary dis-*

missals by District Courts in *violation of the plain language of the statute.* At the outset of the opinion in the *Wright* case we find this language:

> "But while we must decide whether the challenged subsection is constitutional, *we refrain from deciding questions suggested which may arise later in the course of its administration.*
>
> "Second. The decision in the Radford case (pp. 1602, 1604) did *not question the power of Congress* to offer to *distressed farmers the aid of a means* of rehabilitation under the bankruptcy clause."

Appellant under its first specification says that relief under Section 75 (s) may be obtained only by one who has made a *bona fide* attempt and has failed to effect a composition under Section 75 (a) to (r). That a debtor proceeding under Section 75 of the Bankruptcy Act will be halted at the outset if the debtor is beyond all reasonable hope of financial rehabilitation.

We challenge appellant to point to anything *justifying that conclusion* under *any provision of Section* 75 (a) to (s), inclusive. We challenge appellant *to produce any statement justifying that conclusion* in the opinion of the Supreme Court in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440.

The challenge *will not be met* because there is nothing of the kind either in the Act or in the opinion of the court. The Act *itself provides the test* of rehabilitation. First, *payment of rent.* Secondly, *additional payments*, if required. Thirdly, *the complying* with *the orders* of the court. Good faith is presumed.

Footnotes.

Counsel for appellant may argue that he found something to that effect in the footnotes of the opinion in the

Wright v. *Vinton Branch Bank* case, but we are more concerned with headnotes than with footnotes. *Footnotes are not part of the opinion.* Footnotes may *explain* and *clarify* —give backing and authority to an opinion, but *are not* in *any* sense *part* of the opinion. Surely *"obiter dicta"* in a footnote does not become the law of the case.

Surely no one will contend that all the suggestions and propositions laid down in the cases cited in the footnotes in the *Wright* case are *sanctioned* and *approved* by the court and *made part* of the opinion. They are not even *"obiter dicta". The opinion speaks for itself.* The footnotes *explain* and are given simply for the purpose of *amplifying* and *backing* up the reasoning in the decision. But we repeat, they are *not* the decision nor yet *part* of the decision.

Majority Opinion.

In the majority opinion in the *Bartels* case, the case at bar, the court correctly says:

> "The courts have spoken of a lack of 'good faith' in invoking Section 75 as a cause for dismissing the whole proceeding, and some countenance has been given the idea in a footnote to the opinion in the case of Wright *v.* Vinton Branch Bank, *supra. We do not understand it to be a part of the court's opinion. The note mistakenly states that good faith is made a requirement of the initiation* of a proceeding under Sect. 75. That requirement appears in Sect. 74 (a), 11 U. S. C. A., Sec. 202 (a). Section 75 *nowhere mentions initial 'good faith' as a prerequisite* to invoking Subsection (s), or going through bankruptcy if rehabilitation under that Subsection fails. The *good faith* of the offer and acceptance is to *be enquired into* by the court *before confirming* a composition or extension accepted by the majority of creditors, Subsection (i), 11 U. S. C. A., Sec. 203 (i) and that is the *only mention* of good faith in Sec. 75."

Second and Third.

We shall also answer appellant's second and third specifications together because they cover the same ground. Appellant seems distressed because the Circuit Court of Appeals decided the same issue in different cases differently on the same day. They are aggrieved because the court in the *Bartels* case, the case at bar, *did not follow the erroneous "obiter dicta"* in the *decision* in the *Baxster* and the *John Beverly Henderson* cases.

The truth is that there were four Circuit Judges; two who were familiar with Section 75 and with the Supreme Court's decisions in the *Virginia Wright*, the *Beach*, the *Adair* and in the *Indiana Wright* cases, while the other two were not so familiar with either the Act or the decisions. That being the case, the result of the decisions in these three cases depended upon how these judges were assigned. Anyway it is *not only laudable and permissive*, but it is the *duty* of a court to *correct its own erroneous* decision.

It is not the function of Congress to correct judicial error. *Courts themselves have and will continue to do that.* A wise man changes his mind. So does a wise court. The decision in the *Bartels* case *is the correct decision.* It is supported by equity, justice, reason and logic. The question is not so much as to what the decisions of a court have been as what *they ought* to be.

Fifth and Sixth.

We shall now take up appellant's fifth and sixth specifications. These two specifications cover the same ground, the sixth being simply a rehash of the fifth. In all these specifications appellant claims that the District Court was justified in setting aside the adjudication and dismissing the farmer debtor's petition under Section 75. First, because the farmer debtor had no equity in the farm, and therefore the petition

was not filed in good faith in a *bona fide* effort to obtain a composition and extension of time. Secondly, because there was no reasonable hope of the debtor's financial rehabilitation.

> "For the farmer debtor to rehabilitate himself financially within the meaning of Section 75 (s), *it is only necessary* that the debtor *shall be able*, during the statutory period of the moratorium, *to pay a fair rental upon the property which he retains*, and within such period put himself in a position to pay for said property at its appraised value; that he may not be able within such period to pay his debts in full is immaterial." Syllabus In re Anderson, 23 Fed. Supp. 854.
>
> "A farmer can file a petition under Section 75 (s) setting forth that he was unable to obtain the acceptance of the majority in number and amount of all creditors to his extension proposal and he will not be allowed to amend his petition and be adjudged a bankrupt." Syllabus In re Garman, 25 Fed. Supp. 758.

No Equity in His Farm.

The assertion that the farmer debtor, Mr. Bartels, has no equity in his farm *is not borne out by the evidence*. But even if this were true, *which it is not*, the fact is that Section 75 *gives every farmer*, who is insolvent or financially embarrassed, *a legal equity in his farm*. That equity *is the legal right to continue in possession* of his farm—live in his home—*for three years, provided he complies* with the orders of the court, *pays a reasonable rental*, and additional payments, if so ordered by the court. That equity gives him an opportunity to refinance and reestablish himself as a solvent rather than as an insolvent farmer.

That equity is analogous to the equity of redemption now existing in many States. In North Dakota and in other States the farmer has a period of one year in which to redeem from a mortgage foreclosure sale. During that year

he has a right of possession and *is entitled to the rents and profits.*' That is an equity that even insurance companies *must* and *do* respect. This equity of redemption *does not depend* upon *good* or *bad* faith. It does not depend upon whether one is a Christian or a horsethief. It is a *legal right* given to *every owner* of real estate.

No State or Federal Court *has ever* attempted to defeat the equity of redemption by holding that if the person's liabilities *exceed* his assets that then, he is *not acting* in good faith, and, therefore, *not entitled to possession and the right of redemption.* No court, either state or federal, *has ever yet held* that the person who wishes to take advantage of the "equity of redemption" would have to *convince* the court, *in advance,* that he would *be able not only to redeem but to pay all* of his indebtedness. Such a decision would be considered absurd.

Equally absurd are the decisions that hold that under Section 75 a farmer *must show* that his assets *exceed* his liabilities, or else his petition will be held to have been filed in bad faith. Doubly absurd are the decisions that hold that the farmer *must convince* the court, *three years in advance,* that he *will be able* to refinance himself at the end of three years, and *not only pay the market value* for his property *but all he owes.* Such a holding, whether deliberate or otherwise, annuls an Act of Congress, *not because* it is *unconstitutional but because of judicial legislation.* The Supreme Court of the United States *has never given* its approval to any such decisions. We are satisfied *it never will.*

Under Section 75, by expressed terms, the farmer has *a stay of proceeding, a right of possession,* that is similar to an equity of redemption for *three years.* This stay, of course, can be cut short if he fails to pay the reasonable rental, plus such additional payments as ordered by the court. The mere fact that the provisions of Section 75

have been emasculated by some District Courts *does not change the intent of Congress, or the language* of Section 75. We feel confident that the Supreme Court in this case *will once and for all* set these District Courts right.

The right that Section 75 gives to the farmer to remain in possession *for three years* upon paying a reasonable rental is a property right. It is an equity which Congress gave him. It does not depend upon judicial discretion. During that three years the farmer may refinance and rehabilitate himself financially. It was the *hope of Congress* and *it is the hope of the farmer* that during those three years *he might be able* to refinance and rehabilitate himself. That hope *no court may cut short* unless he fails to pay his rental or comply with the lawful orders of the court.

> "Property is *nomen generalissimum*, and extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other incorporal hereditaments," 179 U. S. 141. "The right to redeem from a chattel mortgage is a right of property passing to the trustee of the bankrupt mortgagor." James B. Drake & Sons *v.* Nickerson, 121 A. 86.

However, in addition to the legal equity given by Section 75, Mr. Bartels *has financial equity over and above his indebtedness* in his farm. This is shown by the testimony of Ed Bounds, a building constructor (R. 71 and 72), Gus Becker, a real estate man (R. 77 to 80, inc.), Silver Whitsett, County Agricultural Agent (R. 73 to 75, inc.), Hugh Donegan, an insurance man (R. 75 and 80), Albert Vogel, a real estate man (R. 81 and 82), August Bernherd (R. 83 and 84), M. D. Baker, manager, cotton oil company (R. 85 to 88, inc.), and Mr. Bartels, respondent (R. 8, 31, 71, 72, 95 and 96).

Mr. Bartels' total indebtedness, as shown by the record, is $10,295.30 (R. 4 and 9). Even at the present *low values*

the evidence shows that his farm and other real estate, farm implements, livestock and accounts, including his household goods, are of the reasonable value of $15,000 or $16,000.

According to Mr. Bartels' testimony, *he paid $200* an acre or *$20,000* for this farm. According to the testimony of Mr. Whitsett, the County Agricultural Agent, the farm ought to produce or bring *in $100 a month.* That would be six per cent on a valuation of $20,000. We are very much afraid it isn't the lack of an equity but the desire to grab an equity on the part of the appellant. The bad faith is not upon Mr. Bartels but may rest elsewhere.

> "A farmer's proceedings for agricultural compositions and extensions were not dismissible as against mortgages who, after confirmation of foreclosure sale, held certificates of purchase, where farmer was still in possession of land, deeds had not been issued to purchasers, and District Judge had entered order approving filing of petition, and, if there was good reason why land could not be administered in bankruptcy court, Bankruptcy Act provided a remedy to true owner (Bankr. Act Sec. 75 (n-P), 11 U. S. C. A., Sec. 203 (n-p)." Syllabus, Wilcons *v.* Penn Mut. Life Ins. Co. et al. (C. C. A. 10th C.), 91 F. (2d) 417. See also Heldstab *v.* Equitable Life Assur. Soc. of U. S. et al. (C. C. A. 10th C.), 91 F. (2d) 655.

In the *Virginia Wright* case, 300 U. S. 440, the record discloses that the petitioner's obligation amounted to *$6,559.50* while the value of all his property amounted to only *$2,822.50.* In that case the Supreme Court *did not* hold Section 75 (s) unconstitutional, *because it gave* Mr. Wright *three years* within which to *pay the value* of the farm, but, on the contrary, held it constitutional. In that case the Court says:

> "A court of bankruptcy *may affect* the interests of lien holders in many ways. To carry out the purposes

of the Bankruptcy Act, it *may direct* that *all liens* upon property forming part of a bankrupt's estate *be marshalled;* or that the property *be sold free of encumbrances* and the rights of all lien holders be transferred to the proceeds of the sale. Van Huffel *v.* Harkelrode, 284 U. S. 225, 227 (p. 1604). *Despite* the peremptory terms of a *pledge,* it *may enjoin sale* of the collateral, if it finds that the sale would *hinder or delay* preparation or consummation of a *plan of reorganization.* Continental Illinois National Bank & Trust Co. *v.* Chicago, Rock Island & Pacific Ry. Co., 294 U. S. 648, 680-681 (pp. 1502, 1802, 2230.08). It *may enjoin like action* by a mortgagee which would *defeat the purpose of subsection (s) to effect rehabilitation of the farmer mortgagor.*"

Beach Case.

In the *First National Bank & Trust Company of Bridgeport, Connecticut, v. Francis E. Beach,* 301 U. S. 435, the debtor had a mortgage of *$100,000* on 196 acres of land. The Supreme Court of the United States *did not dismiss* the action, but *declared* him to be *a farmer in good faith.*

"*The products of his toil were food for him and his dependents, and the farmhouse was a home. True, the money returns were scanty.* To some extent this was so because of the blight which fell upon his apple orchard in 1932 or later, cutting down the revenues yield from that source. The scantiness of the yield may have turned him into a bankrupt, but it did not change his occupation. One does not cease to be a farmer because drought or wind or pest may have rendered the farm barren. The critical fact is that the debtor worked an acreage large enough to count, that he did not work at anything else, and that he gave to this work, whether profitable or unprofitable, 'the major portion of his time'. * * * A farmer remains a farmer, just as a lawyer remains a lawyer, though the returns on his investment, while not enough to keep

him going, are larger, none the less, than the profits of his labor."

The Supreme Court *did not throw* Mr. Beach *out* of court. It *sustained* the Circuit Court of Appeals, and held that Mr. Beach *was entitled to the benefits* of the Act, no matter how meager his income. *The fact that he owed $100,000,* and his *assets were only 196* acres of land, *did not prevent* the Supreme Court from *declaring him a farmer in good faith.*

Adair Case.

In the case of *Adair* v. *Bank of America National Trust & Savings Association* (Cal.), 303 U. S. 350, the Supreme Court reversed the Circuit Court of Appeals and held that the Conciliation Commissioner was justified in selling mortgaged property to pay the expenses of harvesting grapes. The expenses included wages for the farmer debtor. The Supreme Court *did not suggest* that the farmer who *did not have any money, nor feed for his horse, was too poor* to go through bankruptcy under Section 75, *nor that he was in bad faith* and that the case should, therefore, have been dismissed. The court says:

> *"These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy Act."*
>
> Again "the argument is that possession by the mortgagor during the stay is necessarily less favorable to the mortgagee than possession by receiver or trustee would be. *This is not true.* The mortgagor is in default, *but it is not therefore to be assumed that he is a wrongdoer* or *incompetent to conduct farming operations.* The legislation is *designed to aid victims* of the general economic depression. The mortgagor is familiar with the property and presumably vitally interested in preserving ownership thereof and ready to

exert himself to the utmost to that end. It is not unreasonable to assume that under these circumstances, the interests of all concerned *will be better served* by leaving him *in possession* than by installing a disinterested receiver or trustee. For the mortgagor holds possession charged with obligations imposed for the benefit of the mortgagee as fully as if the property were in the possession of a receiver or a trustee and there is probably a saving of expense. In order to protect the creditor's interests, the possession is at all times subject to the supervision and control of the court; and if the debtor 'at any time' *fails to comply with orders of the court* issued in the exercise of its supervisory power to *protect* the mortgagee *against waste or other abuse* of his possession by the mortgagor, the court may order the property sold." *Robert Page Wright* v. *Vinton Branch, Mountain Trust Bank*, 300 U. S. 440.

The court, in the case of *Naylor* v. *Cantley*, 96 F. (2d) 761, in holding that when a petition under Section 75 had been filed, the bankruptcy court had exclusive jurisdiction of the bankrupt's property, said:

"Since, under the provisions of section 75 of the Bankruptcy Act as amended, the court of bankruptcy was, upon the filing of the petition, vested with the sole and exclusive jurisdiction of the debtor and his property, and since that court *could not surrender its jurisdiction* to any other court, it *was incumbent* upon the court of bankruptcy to administer the estate of the farmer debtor in accordance with Section 75 of the Bankruptcy Act. Bradford *v.* Fahey, 4 Cir., 76 F. (2d) 628; In re O'Brien, 2 Cir., 79 F. (2d) 715; United States National Bank of Omaha, Neb., *v.* Pamp, 8 Cir., 83 F. (2d) 493; Hoyd *v.* Citizens Bank of Albany Co., 6 Cir., 89 F. (2d) 105."

See also:

Isaacs v. *Hobbs*, 282 U. S. 734, 739 (1931);

Gross v. *Irving Trust*, 289 U. S. 342, 344 (1933).

James Wright Case.

The purpose of Congress in enacting this law is very clearly expressed in the case of *Wright* v. *Union Central Life*, 304 U. S. 502, where the court, speaking through Justice Reed, said:

> "The development of bankruptcy legislation has been towards relieving the honest debtor from oppressive, indebtedness and permitting him to start afresh. By the Act of March 3, 1933, 11 U. S. C. A., Sec. 201, *et seq.*, *the Congress deliberately undertook the rehabilitation of the debtor as well as his discharge from indebtedness.* This legislation for rehabilitation has been upheld as within the subject of bankruptcies."
>
> . . . . . .
>
> "The mortgage contract was made *subject to constitutional power* in the Congress to legislate on the subject of bankruptcies. *Impliedly*, this was written into the contract between petitioner and respondent. 'Not only are existing laws read into contracts in order to fix obligations as between the parties, *but the reservation of essential attributes of sovereign power is also read into contracts* as a postulate of the legal order.' And the fact that in this case the purchaser at the foreclosure sale was also the mortgagee is not a determining factor. Any purchaser at a judicial sale must purchase subject to the possibility of the exercise of the bankruptcy power in a manner consonant with the Fifth Amendment."

See also:

In re Slaughter, 12 Fed. Supp. 206;
Campbell v. *Alleghany Corporation*, 75 F. (2d) 947.

In the recent case of *In re Anderson*, 23 Fed. Supp. 854, Judge Wham said:

> "Yet I think it was in the mind of Congress that the secured creditor would ordinarily be willing to accept

the fair cash value of its security in lieu thereof; that the farmer to rehabilitate himself should be compelled only to refinance the reasonable value of the encumbered property and not to be compelled to pay the entire encumbrance, if it exceeded the value of the security.

"Otherwise, the act, meant to meet a great crisis among the farmers, would be helpful in comparatively few cases. It is generally known that, after the slump in farm values, large numbers of farmers with mortgaged farms awoke to find themselves with their farms mortgaged far beyond their value though there had been an ample margin of safety when the encumbrances were placed on the farms. *It was with a purpose to relieve against such situations and, if possible, to enable the farmer and creditor to adapt themselves to the conditions caused by the radically lowered values so the farmer could save his farm and the creditor get the full value of his security, that Section 75 was enacted.*"

A Mortgage Not Sacred.

"The fact that secured debts are affected by the act does not, of course, raise any grave constitutional question, and can be dismissed with brief comment. 'A secured debt or lien is, so far as the Constitution of the United States is concerned, *a no more sacred kind of property than an unsecured debt,* * * * and the Constitution expressly permits and grants to Congress the power to affect such property, whether it be an unsecured debt or whether it be a lien, by laws relating to the subject of bankruptcies.'" *Campbell* v. *Alleghany Corporation*, 75 F. (2d) 947. See also *In re Burgh*, 7 Fed. Supp. 184, 185; *Continental Ill. Nat. Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Ry.*, 294 U. S. 648.

Congress Not Satisfied.

That Congress is fully aware of the fact that some District Courts have not given full force and effect to Section 75, but have attempted to annul some of its provisions, is

clearly shown by the Reports of the Judiciary Committee of both House and Senate.

> "These amendments have become necessary because of the great confusion caused by the diverse rulings of the various United States district courts, in the construction of section 75. Some courts have held that the farmer debtor could not take advantage of the act after foreclosure sale, and during the period of redemption. Some of these courts have refused to permit the farmer in that position to file his petition, although under the law of the State, he was in possession and full control of the property, and could redeem it within the period allowed. Other courts have held that the farmer could not take advantage of the act during the period of a moratorium established by a State; while others have held that the debtor could not take advantage of the act after sale, but prior to confirmation of sale, although in all of these cases, if the debtor had the money, and were in a position to pay, he could redeem and save his property.
>
> "Obviously, these courts are reasoning too technically, and have failed to carry out the intention of Congress, which was to protect the farmer's property and home. Other courts have just held the opposite, and have given full protection, and carried out the intent of Congress. There should be uniformity. • • •"
> Senate Judiciary Committee Report, May 13, 1935, 74th Congress, 1st Session, Senate Report No. 985.

To the same effect is the Report of the House Judiciary Committee, August 16, 1935, 74th Congress, 1st Session, House of Representatives Report No. 1808.

There is now pending in Congress S. 1935 and H. R. 7528, a bill which extends the provisions of Section 75 to March 4, 1944, and which amends Section 75 in other respects. This Bill was reported favorably without a dissenting vote by the Judiciary Committee of the Senate. This Report again sets forth the congressional intention. We quote:

"It was the intent of Congress, when it passed section 75, that the stay should be for 3 years provided the farmer complied with the provisions of the act and paid the rental as fixed by the court and complied with the orders of the court.

"It was never the intention of Congress that the court should arbitrarily dismiss the farmer's petition because it, the court, decided that the farmer could not pay all of his debts at the end of 3 years or that he was too poor to go through bankruptcy. The intent of Congress was, and is, that the farmer-debtor is to pay the rental and have 3 years not to pay all of his debts but to pay the value of the property. Very few bankrupts are able to pay all their debts.

"This new provision simply corrects abuses of judicial discretion. It prevents judicial legislation. We may state further that many of the district courts and some of the circuit courts of appeals and the Supreme Court have given a proper construction of the language in the present act, but we are sorry to note that others have misconstrued it.

* * * * * * *

"'The objection of section 75 is to save and protect the farmer's home and farm. Obviously that cannot be done if the mortgagee says "I do not care what the value is. I will bid the full amount of the mortgage." Vengeance and hatred should not be permitted by Congress or by courts when it has for its object the destruction of a home.

* * * * * * *

"Surely a mortgagee should not object to this. He is not entitled to more than the value of the property and cannot get any more under any conditions even if he takes the property, unless he wishes simply to bid for vengeance.

"Again, the last sentence of subsection (f) is new language. It reads:

"But, except as otherwise herein provided, the court shall not dismiss the proceedings without complete liquidation and discharge of the farmer-debtor.

"This is simply clarifying language. That was the intention of Congress in the present section 75. Surely the practice now followed by some of the district courts, where they permit the farmer to file his petition and to proceed under the act for one year or more and then upon the motion of some mortgagee dismiss the proceedings and throw the farmer to the wolves, is unjustifiable.

"When a farmer files his petition under this section he is a bankrupt and he should be completely liquidated and discharged of his debts at the end of 3 years, or sooner, if he violates any of the provisions of this act or if he fails to pay his rental or comply with the lawful orders of the court. But his petition should never be dismissed, at least not without his consent and that of his creditors. The court once having obtained jurisdiction should continue jurisdiction and liquidation under the provisions of this section.

. . . . . .

"The law is extended for 4 years. There is no valid reason why it should not be. If it is a good law, and that is no longer under serious dispute, then it should certainly be extended for at least 4 years. By that time the agricultural problem may be solved.

"The legislation is on the subject of bankruptcy. The only farmer who can take advantage of this law is a bankrupt farmer. A bankrupt is a financial wreck. He is a bankrupt because he cannot pay all of his obligations. The question is one of salvaging, saving what can be saved out of the wreck.

"In legislating on this subject it is just as much the duty of Congress and of the courts to consider the unfortunate debtor as it is to consider the unfortunate creditor. Perhaps due to no fault of either the debtor or the creditor the farming venture in which they both had confidence has been dashed upon the rocks. (See *In re Klein*, 1 Howard 279.)

. . . . . .

"When Congress passed the present Section 75 they provided for a public sale, in case the mortgagee was

not satisfied with the appraisal, the reappraisal, or the determination of the value of the property by the court upon evidence. It would have been a violent assumption if anyone had assumed that any mortgagee would deliberately bid more than the property was worth in order to wreck a home.

"Yet, some mortgagees have persistently proclaimed in and out of court that they would bid the full amount of their mortgage, plus interest, taxes, and foreclosure expenses. The truth is that in some cases the farm owners were thus deprived of their home, and the property later sold to strangers for far less than the amount of the mortgage, interest, and taxes. Fairness would have at least suggested that the original owners be given an equal chance.

"Whatever the motive for such procedure it must be condemned. It seems that the courts should have assumed their equitable jurisdiction and in such cases should have refused to confirm the sale because the mortgagee stood before that court with unclean hands. The future and the stability of our Government depends upon homes and not upon the wrecking of them.

* * * * * * *

"The third material change in language is the provision that the court shall not dismiss the proceedings without complete liquidation and discharge of the farmer-debtor. This was the intention of Congress as expressed in clear language in the present section 75 but, because of the decisions of some courts, it has become necessary to restate it in more emphatic language.

"Some of the courts hold that unless the farmer can prove to them that he can pay "all of his debts" by the end of 3 years that then his petition "lacks good faith." One court dismissed 95 cases without giving a single farmer an opportunity to be heard, the judge simply stating that these farmers could "never pay all of their debts." The act does not say "all of their debts," it says the "value of the property" is what the farmer will have to pay.

"We are glad to note that in the *John Hancock Mutual Life Insurance Company* v. *Benno Bartels*, recently decided, the Circuit Court in the Fifth Circuit refused to follow those decisions. That court, in discussing this matter, says in part:

"The courts have spoken of a lack of "good faith" in invoking section 75 as a cause for dismissing the whole proceeding, and some countenance has been given the idea in a footnote to the opinion in the case of *Wright* v. *Vinton Bank, supra.* We do not understand it to be a part of the court's opinion. The note mistakenly states that good faith is made a requirement of the initiation of a proceeding under section 75. That requirement appears in section 74 (a) (11 U. S. C. A., sec. 202 (a)). Section 75 nowhere mentions initial "good faith" as a prerequisite to invoking subsection (s), or going through bankruptcy, if rehabilitation under that subsection fails. The good faith of the offer and acceptance is to be inquired into by the court before confirming a composition or extension accepted by the majority of creditors (11 U. S. C. A., sec. 203 (i)), and that is the only mention of good faith in section 75.

* * * * * * *

"No one can deny that the agricultural situation is still acute, owing to low prices and crop failures. No one can deny but that agriculture is the basic industry of the Nation. Congressional efforts should not be restricted but should receive liberal interpretation. We feel that this legislation is much needed and highly desirable and for the good of the Nation."

Report of Senate Judiciary Committee, August 1, 1939, Senate Report No. 1045.

Summary of Issues.

We shall here enumerate the issues raised in this case, which issues we feel the public good require this Court to dispose of *once and for all.*

One.

May the District Court dismiss a petition because it finds that the farmer debtor's liabilities exceed his assets? *We respectfully submit it may not.* In any bankruptcy proceeding the liabilities *generally exceed* the assets, but courts *may not* refuse the petitioner the benefits of the Bankruptcy Act for that reason and dismiss the petition. When Congress passed Section 75 it *knew* that *95* out of every 100 farmers who would take advantage of the Act would have *more* debts than assets.

Two.

May the District Court dismiss the farmer debtor's petition because the court feels that he will not be able to refinance or rehabilitate himself within three years and, therefore, is not in good faith? Again, we say, *emphatically, it may not.* Section 75 requires the farmer to pay a rental and to comply with the orders of the court. The *payment* of the *rental* and *complying* with the court's orders *is the test.* While the stay is not absolute the provisions by which it may be shortened are in *the statute itself* and *not* in the judgment of the court.

Three.

May the lower court dismiss the farmer debtor's petition because he fails to convince the court, *three years in advance,* that he will be able to pay all of his debts in full? That position is absurd, yet, we regret that that is the holding of some of the District Courts. It shows an entire lack of understanding, not only of the agricultural problem but of the intent of Congress as expressed in plain, simple, English language.

FOUR.

May the District Court dismiss a farmer debtor's petition because in his proposal for a composition or an extension of time he offers to pay to his creditors the proceeds of the products produced by his labor out of the soil of his farm—the farm income? *We submit it may not.* What *more* can a farmer offer than the income from his farm, or *what more can a creditor get out of a farm?* A farmer is not a banker nor is a farm a bank. What the farm produces is all that anyone can get out of a farm.

Again Congress *knew* that *95* out of every 100 farmers who would take advantage of Section 75 would be insolvent and that the only thing they could offer would be the products produced by their labor. *This is not because of the farmer's fault,* but because he was made to feed and clothe the nation *below the cost of production.*

Disposal of These Issues Vital.

May we, therefore, again respectfully request that the Court in its opinion dispose of *each and all of these issues.* Otherwise the decision will simply be another decision and the *confusion* among the District Courts *continue.* We are confident that if these issues are disposed of in this case a great deal of litigation *will be avoided.* Congress will also be spared the embarrassment of continually correcting the erroneous decisions of the District Court by legislative enactment.

Conclusion.

In conclusion permit us to state that we feel that Section 75 of the Bankruptcy Act is entitled to the same generous and liberal treatment at the hands of the District Courts that has been given to Sections 74, 77 and 77b. In accordance with the provisions of Section 75 *it is the duty* of the

District Courts *to continue a farm as a going concern.* We repeat, there is nothing unusual in Section 75. It simply applies well established principles of bankruptcy law to agriculture.

This may appear novel to some District Courts but there is no provision in Section 75 that the Bankruptcy Courts of this nation *have not already made use* of in some cases. The courts have allowed going concerns to remain in possession, and to continue in business under trustees, and without trustees. They have permitted possession and the payment of indebtedness of such concerns on the installment plan, with or without interest. *In re Reiman,* 7 Ben. 445, Fed. Cas. 11673; *Sparhawk* v. *Yerkes,* 142 U. S. 114; *In re Swofford Co.,* 180 Fed. 549; *Burlingham* v. *Crouse,* 228 U. S. 459; *In re Merkus,* 289 Fed. 732 (C. C. A. 2nd); *Traer* v. *Clews,* 115 U. S. 528; *Van Huffel* v. *Harkelrode,* 284 U. S. 225.

Sections 75, 77 and 77B of the Bankruptcy Act *mark a new epoch.* From *now on,* in the *interest* of the *public,* property and wealth will be *conserved* in the hands of *those who created it*—not destroyed. The debtor will be considered *as well* as the creditor. The bankruptcy act is going *to become* an act of *conservation* and *not* an act of wreckage.

During the depression and recession Congress—legislating in the interest of the Nation—saw fit to pass the sections referred to. It did this because it felt they were essential for the preservation of the Nation. This Court has approved that legislation and has given it a broad and liberal interpretation so as to effectuate the intent of Congress within constitutional limitations. *Continental Ill. Nat. Bank and Trust Co.* v. *Chicago, Rock Island, and Pacific Ry.,* 294 U. S. 648; *Robert Page Wright* v. *Vinton Branch of Mountain Trust Bank,* 300 U. S. 440; *Adair* v. *Bank of America National Trust and Savings Association,* 303 U. S. 350.

The Frazier-Lemke Amendment to the Bankruptcy Act does not take any property from the creditors. It gives to the creditors *all of the past efforts, earnings and accumulations of the debtor, his wife and his children,* but it does at the same time *prevent* them from taking the future earnings and accumulations of the debtor, his wife and his children. It deprives the creditors of nothing, but *does prevent* them from *destroying* all value by throwing more farm land and farm property upon the market. It *conserves* the home and property for those *who created and accumulated it,* subject to existing liens up to the par value as judicially determined under the provisions of the Act.

This amendment is a conservation act. Nobody loses anything—it conserves property and values. The creditors will get the present value of the property—that is all they could get before this amendment was enacted or that they are entitled to. In fact they will get more under this amendment than they ever would get by wrecking another million farm homes and destroying all values. The agricultural wealth of this nation can and will be preserved in the hands of those who created it—the farmers.

This is a case in bankruptcy. The legislation in question is legislation on the subject of bankruptcy. The only farmer who can take advantage of this Act is *a bankrupt farmer.* A bankrupt is a financial wreck. The question of interest and profits in bankruptcy proceedings is generally out of the question. *The question is one of salvaging, saving what can be saved out of the wreck.* In legislating on this subject, it is just as much the duty of Congress to consider the *unfortunate debtor,* as to consider the unfortunate creditor.

Section 75 is legislation in behalf of the public welfare. Over 66 per cent of all the farms of this nation are mortgaged (The World Almanac, 1937, p. 346). Due to low

prices, drouth and other adverse conditions over *170 farmers* out of every thousand lost their farms by mortgage foreclosure, bankruptcy, judgment or tax sales, from March 15, 1933, to March 15, 1937 (Circular No. 417, Department of Agriculture and February, 1938, Circular, Bureau of Economics).

That means that in a period of four years 1,020,000 farmers out of 6,000,000 farm families lost their farms. *That is the problem* that Congress dealt with in Section 75 and *will continue* to deal with. In the solution of that problem the District Courts must do their part. They must not obstruct remedial legislation by misinterpretation—by reading something into Section 75 that is not there.

The power of the executive, the judicial and the legislative branches of government are all derived from that same Constitution, and each of these three coordinate branches of our government must respect the power of the other, under the Constitution. *Johnson* v. *United States*, 163 Fed. 30, 32, C. C. A.

Obviously, if without redress the 94 District Courts are permitted to ignore the plain language of an Act of Congress and read their own ideas into the Act then there is nothing to prevent judicial legislation—the encroachment of one branch of the Government upon another.

Respectfully submitted,

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 33

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

BENNO BARTELS,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF THE RESPONDENT BENNO BARTELS.

ALFRED ARAM,
San Jose, California;
SMITH W. BROOKHART,
Washington, Iowa;
GEORGE P. CASEY,
Hope, Arkansas;
GEORGE CLAASEN,
Cedar Rapids, Iowa;
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WALTER NELSON,
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SUPREME COURT OF THE UNITED STATES
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No. 33

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BENNO BARTELS,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF THE RESPONDENT BENNO BARTELS.

(All italics in this brief are supplied, unless noted otherwise.)

PRELIMINARY STATEMENT.

The Policy of the Nation.

On March 3, 1933, the nation initiated a new policy under the power granted in Article I, Section 8, Clause 4 of the Constitution, "To establish • • • uniform laws on the subject of bankruptcies throughout the United States."

In discussing this new policy, Charles Warren in his book "Bankruptcy in United States History," says in his Foreword:

> "At first, relief was demanded only in the interest of the creditor; later, in the interest only of the debtor; but the more recent bankruptcy laws have been regarded as demanded for the National interest in general."

At page 144 he says:

> "Moreover, it had become generally recognized that Congress should not exercise its power in the interest either of the debtor or of the creditor class alone—and that, in fact, there could be no such division of American citizens, since most of us are in one capacity debtors, and in another capacity creditors. *There is now, therefore, a rather general acceptance of the principle that a bankruptcy law is required in the public interest of the Nation at large and for its welfare, apart from the effect of the law upon the particular individuals on whom it is to operate.* Now the chief interest of the Nation lies in the continuance of a man's business and the conservation of his property for the benefit of creditors and himself, and not in the sale and distribution of his assets among his creditors, or even in his own immediate discharge from his debts. Forced sale of property and stoppage of a business in times of depression constitute loss to the Nation at large, as well as to the individual debtors and creditors."

In *Home, etc.* v. *Blaisdell*, 290 U. S. 398, this Court said in the early days of the present great depression, at page 445:

> "Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be, individual cases of another aspect. *The legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief.*"

This Court in four unanimous decisions has recognized and preserved the legislative policy of the Nation, incorporated in Section 75 of the Bankruptcy Act, upon the subject of indebted farmers who are insolvent or unable to meet their debts as they mature. These decisions have been in the following cases:

Wright v. *Vinton*, 300 U. S. 440, decided March 29, 1937, holding Section 75 (s) of the Bankruptcy Act (U. S. C. Title 11, Section 203 (s), Act of August 28, 1935) to be constitutional.

First National Bank v. *Beach*, 301 U. S. 435, decided May 17, 1937, adjudicating the definition of a "farmer" in Section 75 (r), (U. S. C. Title 11, Section 203 (r), Act of May 15, 1935).

Adair v. *Union Central*, 303 U. S. 350, decided February 28, 1938, holding that under Section 75 (a) to (r) and (s) the bankruptcy court is authorized to permit the use of farm proceeds to preserve, cultivate and market a farm crop despite the terms of a mortgage.

Wright v. *Union Central*, 304 U. S. 502, decided May 31, 1938, holding (1) that the moratorium provided in Section 75 (s) supersedes and extends any state statutory redemption provisions in mortgage foreclosure by the terms of Section 75 (n) enacted August 28, 1935, and (2) that any property acquired by the farmer debtor during the pendency of his farmer debtor proceedings under Section 75 and before the filing of an amended petition under Section 75 (s) is subject to the jurisdiction of the bankruptcy court.

Very recently this Court in *Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, said at page 390 (referring to the authority of corporate entities for governmental ends to sue and be sued): "Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals *a definite attitude on the part of Congress*

which should be given hospitable scope." Note 4 of the opinion, at page 391 cites several decisions of this Court and other authorities and quotes Mr. Justice Holmes on Circuit, in *Johnson* v. *United States,* 163 Fed. 30, 32, C. C. A. 1st, as saying:

> *"The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.* The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at but you have not said it and therefore we shall go on as before."

While many of the lower courts have scrupulously adhered to the policy designed to be followed by Section 75 as to farmer debtors many have not, in the opinion of the legislature, done so. As an example of many similar official expressions from the legislative branch of the government the following extracts are quoted from Report No. 1045 of the Judiciary Committee of the Senate, 76th Congress, 1st Session, dated August 1, 1939:

> "It was the intent of Congress, when it passed Section 75, that the stay should be for 3 years provided the farmer complied with the provisions of the act and paid the rental as fixed by the court and complied with the orders of the court."
>
> • • • • • • •
>
> "The Supreme Court has repeatedly held that, in bankruptcy, mortgaged property could be sold free and clear of encumbrances or lien and all that the mortgagee was entitled to was the proceeds. It has held that the mortgaged property could be sold at either private or public sale. *The object of Section 75 is to save and protect the farmer's home and farm.* Obvi-

ously that cannot be done if the mortgagee says 'I do not care what the value is. I will bid the full amount of the mortgage.' Vengeance and hatred should not be permitted by Congress or by courts when it has for its object the destruction of a home."

• • • • • • •

"Surely a mortgagee should not object to this. He is not entitled to more than the value of the property and cannot get any more under any conditions even if he takes the property, unless he wishes simply to bid for vengeance."

• • • • • • •

"In legislating on this subject it is just as much the duty of Congress and of the courts to consider the unfortunate debtor as it is to consider the unfortunate creditor. Perhaps due to no fault of either the debtor or the creditor the farming venture in which they both had confidence has been dashed upon the rocks. (See *In re Klein*, 1 Howard 279.)

• • • • • • •

"Some of the courts hold that unless the farmer can prove to them that he can pay 'all of his debts' by the end of 3 years that then his petition 'lacks good faith.' One court dismissed 95 cases without giving a single farmer an opportunity to be heard, the judge simply stating that these farmers could 'never pay all of their debts.' The act does not say 'all of their debts,' it says the 'value of the property' is what the farmer will have to pay. We are glad to note that in the *John Hancock Mutual Life Insurance Company* v. *Benno Bartels*, recently decided, the Circuit Court in the Fifth Circuit refused to follow those decisions. That court, in discussing this matter says in part:

" 'The courts have spoken of a lack of "good faith" in invoking section 75 as a cause for dismissing the whole proceeding, and some countenance has been given the idea in a footnote to the opinion in the case

of *Wright* v. *Vinton Bank, supra.* We do not understand it to be a part of the court's opinion. The note mistakenly states that good faith is made a requirement of the initiation of a proceeding under section 75. That requirement appears in section 74 (a) (11 U. S. C. A. sec. 202 (a)). Section 75 nowhere mentions initial "good faith" as a prerequisite to invoking subsection (s), or going through bankruptcy, if rehabilitation under that subsection fails. The good faith of the offer and acceptance is to be inquired into by the court before confirming a composition or extension accepted by the majority of creditors (subsec. (i), 11 U. S. C. A. sec. 203 (i), and that is the only mention of good faith in section 75.'

* * * * * * *

"No one can deny that the agricultural situation is still acute, owing to low prices and crop failures. No one can deny but that agriculture is the basic industry of the Nation. Congressional efforts should not be restricted but should receive liberal interpretation. We feel that this legislation is much needed and highly desirable and for the good of the Nation."

ARGUMENT.

I.

The "Provisions for the Relief of Debtors" initiated in Chapter VIII of the Bankruptcy Act by the Act of March 3, 1933 and continuing into the Municipal Debt Relief provisions in Sections 81 to 84 of the Bankruptcy Act show that the farmer debtor Section 75, is distinctly different from all others on the subject of filing and dismissal.

The applicable portions of the various acts are here set forth from "Bankruptcy Laws 1938," 75th Congress, 3rd Session, Senate Document No. 225 (except Section 74 which was repealed by the Chandler Act). The remaining Sections 75, 77, 77B and 81 to 84 have not been materially

changed in the respects noted by the Act of June 22, 1938, (the Chandler Act).

Provisions Relating to the Filing of Debtor-Relief Proceedings.

At no place does Section 75 require that a petition be filed in good faith while all other debtor sections do so specifically.

Section 74 (a), Act of March 3, 1933. (Individuals): "Upon the filing of such a petition * * * the judge shall enter an order approving it * * * *if satisfied that such petition * * * has been filed in good faith,* or dismissing it."

Section 75 (Farmers): (No such provision.)

Section 77 (a) (Railroads): "Any railroad * * * may file * * * a petition * * * the judge shall enter an order * * * approving it * * * *if satisfied that such petition * * * has been filed in good faith,* or dismissing it * * *"

Section 77B (a), Now Section 141. (Corporations): "Upon the filing of a petition * * * the judge shall enter an order * * * approving the petition * * * *if satisfied that it has been filed in good faith,* or dismissing it * * *"

Section 84 (a) (Municipalities): "Upon the filing of such a petition the judge shall enter an order * * * approving it * * * *if satisfied that such petition * * * has been filed in good faith* or dismissing it, * * *"

Provisions Relating to the Dismissal of Debtor-Relief Proceedings.

Each of these Sections further provides for the liquidation of the estate or dismissal of the proceedings if a proper proposal is not made by the debtor. Section 75 for farmer debtors contains no such provision.

Section 74 (g) Act of March 3, 1933. (Individuals): "If * * * the debtor's proposal has not been ac-

cepted * * * or * * * confirmation has been denied * * * the court may appoint a trustee * * * *to liquidate the estate.*"

Section 75 (Farmers): No such provision.

Section 77 (e) (Railroads): "If the judge shall not approve the plan * * * he shall enter an order in which he may either *dismiss the proceedings,* or * * * refer the proceedings back to the Commission * * *"

Section 77B (c) (8) Now Section 236. (Corporations): If a plan be not proposed, confirmed or consummated the judge * * * shall * * * enter an order *dismissing the proceedings* * * *" (or order bankruptcy proceedings).

Section 84 (e) (Municipalities): "* * * the judge * * * shall enter an interlocutory decree confirming the plan if satisfied * * * If not so satisfied, the judge shall enter an order *dismissing the proceeding.*"

While Section 75 (i) provides that the court "shall *confirm the proposal* if satisfied that * * * the offer and its acceptance are in good faith," *no provision of Section 75 requires that a farmer debtor's petition shall be filed in good faith nor does it anywhere provide for a dismissal of the case.* Section 75 (s) contains provisions distinctly different from those above quoted from Sections 74, 77, 77B and 81 to 84.

The applicable portions of Section 75 (s) read as follows:

"Any farmer failing to obtain the acceptance of a majority * * * of all creditors * * * or if he feels himself aggrieved * * * may amend his petition * * * asking to be adjudged a bankrupt * * *

(1) After * * * appraisal * * * the referee *shall issue an order* setting aside * * * exemptions * * * and *shall order that the possession* * * * *of the debtor's property shall remain in the debtor* * * *.

(2) When the conditions set forth in this section have been complied with, *the court shall stay all* * * *

proceedings • • • *for three years.* During such three years *the debtor shall be permitted to retain possession* • • •, provided he pays • • • rental • • •

(3) *At the end of three years* • • • the debtor may pay into court the amount of the appraisal • • • and thereupon the court shall • • • turn over full possession and title • • • free of encumbrances to the debtor • • •"

It would seem to be clearly established that there is no provision authorizing a farmer debtor's petition to be dismissed. If for any reason the procedure prescribed by the statute has not been followed, due regard for the principles of equity and the policy of the law would suggest a remand of the case to the conciliation commissioner for proper procedure in accordance with the Act.

The foregoing conclusion seems to be particularly indicated by the usual informality of the proceedings in farmer debtor cases where the farmer debtor often is not represented by counsel. The Act itself in Section 75 (q) reads: "A *conciliation commissioner shall upon request assist any farmer in preparing and filing a petition* under this Section and in all matters subsequent thereto arising under this Section and *farmers shall not be required to be represented by an attorney in any proceeding under this Section.*"

The Record shows that Mr. Bartels was not represented by counsel until all of the proceedings complained of in the petitioner's motion to dismiss had been fully completed. Proceedings under subsections (a) to (r) were disposed of and the amended petition under Section 75 (s) was filed by March 23, 1938. R. 7 to 11. Counsel for the farmer debtor first appears in the record on April 5, 1938. R. 11 to 14. The report of the hearing on December 21, 1937 shows counsel for the petitioner but none for the farmer debtor. R. 15.

II.

An examination of the cases relied upon in the petitioner's brief shows that they do not support the thesis of the petition that the farmer debtor's case should be dismissed.

We have carefully read all of the cases mentioned in the Brief for Petitioner, not only those cited but those referred to in the quotations from opinions. We shall endeavor to state very briefly the point or points of each of the cases which indicate its weakness as support for the petitioner.

Petitioner's Brief, Page 2.

Baxter v. *Savings Bank*, 92 F. (2d) 404 C. C. A. 7, 1937. *The Court found that the petitioner was not a farmer.* Page 136: "The evidence amply sustained the conclusion of the court, that appellant was not a farmer within the meaning of the Act." As it is only a "farmer" as defined in the Act (Section 75 (r)) who may invoke it (Section 75 (c)) the finding that the petitioner was not a farmer effectually disposed of the issue and required a dismissal of the case.

All discussion in the opinion of what the law would be as applied to a case in which the petitioner came within the law is *obiter dicta*, as much so as if the opinion had been advanced in a case invoking Section 77 for Railroads.

It may be noted further that the court *did not dismiss the case* but recommended further proceedings.

In Re Henderson, 100 F. (2d) 820 (not "280") C. C. A. 5 1938. Without notice to the farmer debtor the court dismissed the case 74 days after the creditors' meeting. No time had been fixed for the filing of an application for confirmation of a proposal. In view of General Order 50, paragraph (4) directing the fixing of a time "not later than three months" it would seem that the dismissal was premature, to say nothing of the lack of any notice to the farmer debtor. At the foot of the first column on page 821 of the

report of the case the opinion intimates that the farmer debtor should have applied *for an opportunity* to make a new offer.

Judge Hutcheson dissented from the foregoing decision saying that 75 (s) "without exception, limitation or qualification provides: '(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt.' "

Wilson v. *Alliance* (said to be not yet officially reported but reported in), 102 F. (2d) 365. C. C. A. 1939. The farmer debtor died after her amended petition had been filed and she had been adjudicated a farmer debtor bankrupt under Section 75 (s). The administratrix of the estate applied for leave to proceed which was denied. The court held the proposal of the deceased was defective and (quoting from page 366 of the opinion) "Furthermore the petition to be adjudged a bankrupt under Section 75 (s) is merely an amendment to the prayer of the petition for a composition and extension under *Section 75 (a) to (r), as to which there is express statutory authority to dismiss because not filed in good faith.*" This is a misstatement of the law as Section 75 nowhere contains any provision for dismissal. The writer of the opinion evidently was thinking of the dismissal provisions of Sections 74, 77, 77B or 84 which have been quoted at pages 7, 8 and 9 of this Brief.

Petitioner's Brief, Page 3.

In re Borgelt, 79 F. (2d) 929, C. C. A. 7, 1935. This decision held that the farmer debtor had no property right in his farm because the State statutory redemption period had started to run after mortgage foreclosure. The decision is expressly based upon the *Lowmon* decision, 79 F. (2d) 887 C. C. A. 7, 1935, which was reversed

by this Court in *Wright* v. *Vinton*, 300 U. S. 440 (1937) and later overruled in *Wright* v. *Union Central*, 304 U. S. 502 (1938). The decision is also grounded upon the former Section 75 (k) of the Act of March 3, 1933 which prohibited a proposal that would reduce the amount of a secured debt. The present Section 75 (k) enacted August 28, 1935 permits the proposal to be based upon the *value of the security* as distinguished from the amount of the debt. This decision is discussed in this brief at page 23.

Helstab v. *Equitable*, 91 F. (2d) 655, C. C. A. 10, 1937. This case also was based upon the interpretation that after the State statutory redemption period following foreclosure had started to run the farmer debtor had no property right and that Section 75 did not extend the redemption period. This interpretation was overruled in *Wright* v. *Union Central*, 304 U. S. 502. It is important to note that the court *refused to dismiss the case* but suggested that the mortgagees follow the mandatory procedure of Section 75 (o) The opinion is also based upon the former Section 75 (g) of the Act of March 3, 1933 which required the proposal for composition to be accompanied by a full cash deposit. This requirement was deleted in the present Section 75 (g) enacted August 28, 1935. The court also found that *the farmer debtor had never made or submitted any proposal.*

Pearce v. *Coller* (*Collier*), 92 F. (2d) 237, C. C. A. 3, 1937. The farmer filed a voluntary petition in *regular bankruptcy* under the Act of 1898. A trustee was appointed who took title to the property. *Without ever filing any petition under Section 75 (a) to (r)* seeking composition or extension the farmer filed an amended petition under Section 75 (s). The court held that the farmer had transferred his title to the trustee and therefore had none to be subject to Section 75.

It further held there was no authority under the Act of August 28, 1935 for transferring the case upon the written

application of the farmer debtor from regular bankruptcy into Section 75. This holding was in violation of the last sentence of Section 75 (s) (5) which reads: "Any farmer who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court • • •."

In re Coleman, 93 F. (2d) 1001, C. C. A. 6, 1938. This case also arose out of the riginal Section 75 (k) requiring a proposal to be in the full amount of the secured debt which was repealed by the present Section 75 (k) basing the proposal upon the *value of the security.* Act of August 28, 1935. It is also to be noted that *the case was not dismissed.* The farmer was permitted to continue in the proceedings under Section 75 (s) upon paying taxes and interest *despite his defective offer.*

Massey v. *Harris,* 94 F. (2d) 526, C. C. A. 4, 1938. After repeated continuances granted by the conciliation commissioner in an attempt to effect a settlement under Section 75 (a) to (r) the farmer debtor filed her amended petition under Section 75 (s). The court held the proposals were not sufficient and dismissed the *amended petition,* but *did not dismiss the case.*

Petitioner's Brief, Page 14.

In re Hilliker, 9 Fed. Sup. 948, District Court, California, 1935. This district court held the *petitioner was not a "farmer"* but a dentist, which finding effectually disposed of the case leaving the court's observations upon the other questions as mere *obiter dicta.* This case was also filed while the original Section 75 (k) required a proposal to be in the full amount of the secured debt.

Petitioner's Brief, Page 15.

In re Ballard, 10 Fed. Sup. 549, District Court, California, 1935. The farmer debtor's amended petition under Section 75 (s) was denied because he had *never submitted any pro-*

posal under Section 75 (a) to (r). The farmer was left free to go back and comply with the provisions of Section 75 (a) to (r) by attempting to obtain a settlement. *The case was not dismissed.* The court remarked that the farmer apparently misunderstood the law and said:

> "• • • the farmer must either have actually proposed a plan which the creditors have not accepted or he must feel aggrieved by one they have accepted. The petition does not disclose such facts. The petition must accordingly be denied *without prejudice.*"

In re Vater; 14 Fed. Sup. 633, District Court, Kentucky, 1936. The proposal was for an extension of 15 years, the farmers to pay taxes, make repairs, and pay semiannually out of farm income. Not obtaining an acceptance the farmer debtors filed an amended petition. The court characterized their proposal as "preposterous" and dismissed the whole case without permitting a revised proposal to be made in accordance with the court's conception. This case is discussed later in this brief at page 26.

In re Schaeffer, 14 Fed. Supp. 807, District Court, Maryland, 1936. The farmer debtor's proposal was conditional upon a favorable decision in a pending State case. His amended petition was dismissed, the court holding that it was not sufficient. *The case was not dismissed.* This case is again discussed at page 26 of this brief.

Petitioner's Brief, Page 16.

Steverson v. *Clark,* 86 F. (2d) 330, C. C. A. 4, 1936. This decision stated that the court had held Section 75 (s) to be void. This case is quoted in *Wright* v. *Vinton,* 300 U. S. 440, as having held Section 75 (s) unconstitutional. Under these circumstances the court could do nothing but dismiss the proceedings. This case is discussed again in this brief at page 24.

In re Buxton's Estate, 14 Fed. Supp. 616, District Court, Illinois, 1936. This decision held Section 75 (s) to be uncon-

stitutional and this Court so stated in *Wright* v. *Vinton*, 300 U. S. 440. It also held (despite the provision of Section 75 (r) that the personal representative of a deceased farmer is a "farmer" and therefore entitled to invoke the Act) that such personal representative could not proceed under it. Like other similar decisions the opinion went on to discuss what was not before it after it found that it had no jurisdiction. By its own decision it had no jurisdiction because (1) it held the Act to be void and (2) it held that the administrator could not proceed. This case is later discussed again in this brief at page 25.

In re Duvall, 14 Fed. Supp. 799, District Court, Virginia, 1935. This case under the original Section 75 (k) requiring a proposal in the full amount of the secured debt *merely denied confirmation of the proposal. The case was not dismissed.* This decision is later discussed at page 26.

In re Wylie, 16 Fed. Supp. 193, District Court, South Carolina, 1936. The proposal was that the farmer debtor should remain in possession of his farm and pay to his creditors any profit he could make. The court held the proposal was not acceptable and *continued the case for a new proposal which was not forthcoming*, whereupon the proceedings were dismissed. This case is later referred to, page 27 of this brief.

In re Siske, Bankruptcy Law Service, Commerce Clearing House, paragraph 3931, District Court, North Carolina, 1936. This decision held that the following facts proved fraud and bad faith in the farmer debtor in filing his petition under Section 75. 1. The mortgage installments were delinquent for 4½ years. 2. Taxes were unpaid for 7 years. 3. No fire insurance was carried. 4. There had been no effort to pay the debts scheduled in the petition. 5. The property had not been kept in repair.

In view of the provision of Section 75 (c) that "• • • a petition may be filed by *any* farmer stating that the farmer is *insolvent or unable to meet his debts* as they mature • • •"

it would seem that the reasoning of this decision would *equally disbar any petitioner from filing a voluntary bankruptcy.* The qualifications specified in the Act would, by this decision, disqualify him from invoking it!

In re Sterba, 74 F. (2d) 413, C. C. A. 7, 1935. This case involved *Section 74 and not Section 75.* The district court refused to vacate a restraining order prohibiting foreclosure against the assets of the petitioner. The Circuit Court held Section 74 to be constitutional and sustained the district court. The court aptly said that "* * * success under this Act will not be assured unless the court recognizes that its duties are primarily administrative * * *. It must originate, if necessary, and *in many instances use all the forces at its command to bring about cooperation of conflicting interests.*"

We have now completed an examination of every case relied upon by the petitioner (except *Wright* v. *Vinton,* which will be discussed later in this Brief at page 18) and we cannot conclude that they sustain such a drastic measure as the dismissal of an entire case merely because, after proceedings for composition and extension have progressed into Section 75 (s) a creditor *then* suggests that a proper proposal was not made. The remedy would seem to be to ask for a reopening of the composition and extension proceeding if they were not satisfactory to the creditor.

It would seem that the essence of the petitioner's argument, and of all other such objecting creditors (upon whose procedure the present objection is based for they follow a common pattern) is that because a farmer debtor invokes Section 75 he is therefore acting in bad faith! With such an attitude we believe **the national interest and a due regard for expressed legislative policy require disagreement.**

In fact the Record in this case shows little difference between the farmer debtor, Mr. Bartels, and the petitioner, John Hancock Mutual Life Insurance Company. At Record 4 the report of the conciliation commissioner shows that

the farmer debtor proposed to pay $700 to the petitioner at once. ($250 proceeds from personalty and $450 from city lots. R. 47, top of page.) He proposed to pay up the entire delinquencies within three years. The other creditors present agreed to an extension. *The only bar to a settlement* under Section 75 (a) to (r) *was the petitioner,* John Hancook Mutual Life Insurance Company, which stated that it would agree to wait on its principal if *all* delinquencies were paid. R. 4. Upon *this small difference* the petitioner seeks the dismissal of the entire proceeding. This would defeat the purpose of Section 75 which the farmer debtor has invoked.

III

A creditor who participates in proceedings under Section 75 for composition and extension and after the proceedings are closed and an amended petition is filed under Section 75 (s) then objects to the proceedings under Section (a) to (r), is estopped.

In the present case the petitioner participated in the composition and extension proceedings before the conciliation commissioner. When those proceedings failed (solely because of the petitioner's refusal to accept the proposal) and the farmer debtor amended his petition, following the procedure laid down in Section 75 (s), the petitioner for the first time questioned the regularity and sufficiency of the proceedings in which it had participated without objection. It would seem to have been estopped.

In *In re Plummer,* 9 Fed. Supp. 923, the secured creditor participated in the proceedings under Section 75 (a) to (r) as here and, after an amended petition was filed, raised objections. The Court said: "A creditor may not participate in the administration of a bankrupt estate until he considers it to his disadvantage and then challenge the proceedings. The creditor must select his course, and, when

selected, may not change. He must also act promptly. The creditor is therefore estopped from pressing its petition."

The court cited in support of its holding: *In Re Commonwealth*, 223 Fed. 667; *In Re First National Bank*, 152 Fed. 64; *In Re Broadway*, 152 Fed. 152; *In Re Hill*, 159 Fed. 73; *Rudebeck* v. *Sanderson*, 227 Fed. 525; *Mason* v. *Dean*, 31 F. (2d) 945; *In Re New England*, 169 Fed. 586.

In Re Moser, 95 F. (2d) 944, C. C. A. 9, 1938, held likewise.

To the same effect was held in *Campbell* v. *Corporation*, 105 F. (2d) 197, C. C. A. 9, 1939, where a creditor verbally assured a farmer debtor that terms of payment in a written contract making time of the essence need not be strictly observed. When the creditor objected to farmer debtor proceedings under Section 75 the court held him to be estopped.

IV

The decision in Wright v. Vinton, 300 U. S. 440, does not sustain the petitioner's contention that the proceedings be dismissed.

Following the holding by the court in *Wright* v. *Vinton*, 300 U. S. 440, that Section 75 (s) is constitutional objecting creditors in every circuit avidly seized upon Note 6 at page 462 of the opinion as warranting dismissal of farmer debtor proceedings. We cannot agree that Note 6 is to be so construed. The court was adjudicating Section 75 (s) and not Section 75 (a) to (r).

In discussing paragraph (3) of Section 75 (s) the opinion at page 462 says:

> "Paragraph 3 authorizes the court to have the property sold if 'at any time' the debtor should fail to comply with orders of the court issued under its power to require interim payments on principal, or otherwise in the course of its 'supervision and control' of his possession. Paragraph 3 also provides that 'if • • •

the debtor at any time * * * is unable to refinance himself within three years,' the court may close the proceedings by selling the property. This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three year period."

Then Note 6 is inserted which reads as follows:

"This construction is in harmony with the requirement of good faith in the initiation of proceedings under Section 75. Relief under Section 75 (s) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Section 75 (a) to (r). The offer of composition must be in good faith [March 3, 1933, Section 75 (c), (i), 47 Stat. at L. 1471, 1472, Chap. 204, 11 U. S. C. A. Section 203], and if the debtor is beyond all reasonable hope of financial rehabilitation, and the proceedings under Section 75 cannot be expected to have any effect beyond postponing inevitable liquidation, the proceedings will be halted at the outset. *The practical administration of Section 75 in the lower courts* already affords ample evidence of *the substantial protection afforded the creditor* by this requirement of good faith in the initiation of proceedings under subsections (a) to (r). See Re Borgelt (C. C. A. 7th) 79 F. (2d) 929, 30, Am. Bankr. Rep. (N. S.) 298; Steverson *v.* Clark (C. C. A. 4th,), 86 F. (2d) 330; Knotts *v.* First Carolinas Joint Stock Land Bank (C. C. A. 4th), 86 F. (2d) 551; Re Reichert (D. C.), 13 F. Supp. 1, 4, 5; Re Paul (D. C.), 13 F. Supp. 645, 647; Re Buxton (D. C.), 14 F. Supp. 616, 30 Am. Bankr. Rep. (N. S.), 663; Re Vater (D. C.), 14 F. Supp. 631; Re Schaeffer (D. C.), 14 F. Supp., 807; Re Duvall (D. C.), 14 F. Supp. 799; Re Byrd (D. C.), 15 F. Supp. 453; Re Wylie (D. C.), 16 F. Supp. 193, 194; Re Price (D. C.), 16 F. Supp. 836, 837. Compare Re Chilton (D. C.), 16 F. Supp. 14, 17; Re Davis (D. C.), 16 F. Supp. 960. It must be assumed that the situation

of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition at the outset. Compare Tennessee Pub. Co. *v.* American Nat. Bank, 299 U. S. 18, 22, ante, 13, 15, 57, S. Ct. 85, 32 Am. Bankr. Rep. (N. S.) 180."

This Note 6 was a parenthetical suggestion that such interpretation of paragraph (3) of subsection (s) is not out of harmony with the administration by many lower courts of proceedings under the preceding composition provision in subsections (a) to (r). Again it should be noted that the Supreme Court was adjudicating subsection (s) and not subsections (a) to (r).

The first three sentences of Note 6 are based upon the first sentence of subsection (s): "Any farmer failing to obtain the acceptance of a * * * proposal, or if he feels aggrieved by a composition * * * may amend his petition." Most assuredly there must have been made a proposal which was rejected or accepted and if accepted has aggrieved the farmer debtor before subsection (s) may be invoked. Subsection (i) in clause (3) makes confirmation of the proposal dependent upon a finding that "the *offer* and its *acceptance* are in good faith." Lack of such confirmation will *halt* the proceedings *at the outset.* No one would contend that "if the debtor is beyond *all reasonable hope* of financial rehabilitation, and the proceedings under Section 75 cannot be *expected* to have *any effect* beyond postponing *inevitable* liquidation," the proceedings would be permitted to remain in the bankruptcy court *without further action.*

Note 6 then continues by saying that "The *practical administration* of Section 75 in the lower courts already affords *ample evidence* of the *substantial* protection afforded the creditor by this requirement * * *". *The opinion was not approving the action of the lower courts* as none of the cases cited in the note was before the court, and

some of them were overruled by the decision which referred to them. The opinion was showing that the secured creditors had nothing to complain of in the practical administration of the provisions preceding subsection (s). It might *strongly disapprove of the actions of the courts in the cases cited,* and might even overrule them in a proper case before it (and it did *overrule four of them*) but still it might use them as examples to *point out to the secured creditors that they had nothing to complain of by the actions of such courts.*

Following the citation of the 15 cases the court further remarked in Note 6 that "It must be assumed that the situation of the present debtor (Wright) was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition at the outset." A look at the situation of farmer debtor Wright which the court was discussing and the arguments based upon the debtor's situation further discloses this Court's careful regard for the legislative purpose back of Section 75 for the relief of farmer debtors.

The following information concerning Wright's situation is taken from the Transcript of the Record filed in that case, *Wright* v. *Vinton,* 300 U. S. 440. The farmer debtor had been an invalid from heart disease for three years. His real estate mortgage was $5950 and his total debts were $6559. His real estate was valued at $2500, and his farm animals at $173. He had vehicles and implements valued at $57. His total assets were $2882. This shows *Mr. Wright's secured debt to have been between two and three times the value of the security* and that he had little equipment to farm with.

> His proposal was that he "suggests and proposes that he be granted a period of 12 months to pay off his indebtedness"; that he was "willing to consider a shorter period." He "suggests that a definite effort be made to interest buyers in the purchase of the box-

wood on his premises. Said debtor has been informed that this boxwood *once* had a fair market value ranging between $1000 and $1200. He is not informed as to its present market value, but he is making an effort to ascertain this. While its value has certainly diminished substantially, said Debtor thinks that it is yet sufficiently valuable to enable him to pay up all overdue interest, taxes, insurance premiums, if any are overdue, to provide for any insurance premiums to accrue, to provide for the payment of interest for, say, a year in advance, and to provide for taxes for such a period.

Thus the investment would be made a live investment for the first lien creditor during the period indicated. The said Debtor especially asks the co-operation of his creditors and in particular of the first lien creditor toward securing a market for this boxwood, and toward the application of the proceeds from the sale thereof, as above indicated.

Said debtor would further set forth that there is now pending in the Congress of the United States a bill known as the Frazier-Lemke Refinancing Bill, which provides for loans up to the full value of farming lands based on existing appraisements, and further provides for an interest rate of only 1½% a year, and for repayment of the principal on the amortized plan at only 1½% per year, making the total annual charge on account of principal and interest of 3%, or, for illustration, of only $90 a year on a loan of $3,000.

This Refinancing Bill has not yet become a law. Said debtor would not pretend to say that it will become a law. He does know, however, that there is a very strong sentiment in Congress for this Bill and that there is a reasonable probability that it will be enacted into law. He asks the extension aforesaid both because the boxwood may be turned into cash in the near future and because said Refinancing Bill may become a law in the near future.

It is the purpose of the said debtor to make an active effort immediately to sell the boxwood if the creditors shall agree upon this plan, and not delay by reason of any extension of a year that may be granted him. To

this he pledges himself and asks the co-operation of his creditors."

It would be difficult to find, or compose, a proposal more indefinite or less feasible than that of Mr. Wright.

In its brief filed in the Wright case the respondent referred to the situation of Mr. Wright by saying: "should the constitutionality of this legislation be upheld, a further order will have to be entered staying foreclosure proceedings for a period of three years, and this will be done in spite of the fact that *the bankruptcy schedule shows no possible hope of solvency and contains no possible basis of a financial rehabilitation as is claimed as the great objective of this Act.*" (Italics from the original.) The foregoing is the background of the statement: "It must be assumed," etc., quoted above from this Court's decision.

The Fifteen Cases Cited in Note 6 of Wright v. Vinton, 300 U. S. 440.

Each of the cases cited in Note 6 will be examined here. There are 15 of them. It can not be said that they are authority for anything except exactly what this Court said it cited them for—that is to show that the creditors had no cause for complaint in the manner of the treatment accorded them under Section 75.

1. *In re Borgelt*, 79 F. (2d) 929, C. C. A. 7, 1935. For two reasons the *Borgelt* case has no present authority. (1) It adjudicated the original subsection (k) which has been repealed and superseded. (2) It followed the previous *Lowmon* decision. The *Lowmon* case, and likewise the *Borgelt* case which followed it, were both overruled by the very *Wright* v. *Vinton* decision which cited it in Note 6 and later by *Wright* v. *Union Central*, 304 U. S. 502. However, the mortgage holders continue to push the *Borgelt*

decision upon the courts as authority. This decision is discussed elsewhere in this brief at page 11.

2. *Dallas Land Bank* v. *Davis*, 83 F. (2d) 322, 323, C. C. A. 5, 1936. No facts are given. The opinion merely makes the negative statement that the District Judge "found on sufficient evidence that at that stage of the proceedings there was no such showing of inability to finance the debt with the assets involved as would justify the court *in refusing to take jurisdiction.*" *The proceedings were not dismissed.* The Supreme Court noted this case as one holding subsection (s) to be constitutional.

3. *Steverson* v. *Clark*, 86 F. (2d) 330, C. C. A. 4, 1936. This case also held subsection (s) unconstitutional. No facts are given in the opinion except that an amended petition under subsection (s) had been dismissed. "The judge below approved findings by the conciliation commissioner to the effect that an offer of composition and extension had not been made in good faith by the bankrupt, and he accordingly refused an adjudication of bankruptcy and dismissed the proceedings on that ground." That holding was correct. The offer not being made in good faith subsection (i) required its rejection. As a second ground of its decision, the court said: "*In addition to this we have recently held that the second Frazier-Lemke Act is void.* * * *" *This Court's opinion also noted this case as having held subsection (s) to be unconstitutional and overruled it.* This case is elsewhere discussed in this brief at page 14.

4. *Knotts* v. *First Carolinas Land Bank*, 86 F. (2d) 551, C. C. A. 4, 1935. This case also arose out of the old subsection (k) which has been repealed and superseded, and it also held subsection (s) unconstitutional. The farmer debtor's amended petition under subsection (s) had been rejected and his proceedings dismissed because the court

held that the proposal had not been made in good faith. The appellate court said: "Certain it is that *any offer of composition or extension must amount to naught unless accepted by the appellee;* and it clearly appears that the appellee will accept no such offer." This conclusion is clearly erroneous. It is judicial legislation in attempting to repeal Section 75 by allowing a creditor to veto the farmer debtor's right to invoke the provisions of Section 75. This decision is not aided by the fact that the case arose when subsection (k) required the proposal to be not less than the full amount of the secured debts with interest. The opinion continued: "In addition to this the appellee in its petition below challenged the constitutionality of the second Frazier-Lemke Act under which adjudication was sought by appellant; * * * *we cannot ignore our recent holding that this act is void* * * *." What this decision lacks in juristic standing is offset by its "ample evidence of the substantial protection afforded to the creditor." This Court's opinion also noted this case as having held subsection (s) to be unconstitutional.

5. *In re Reichert,* 13 Fed. Supp. 1, 4, 5, District Court, Kentucky, 1936. The court merely said on this subject: "Under this section the composition or extension proposal must have been made in *good faith,*" a statement fully justified by subsection (i) which makes it a condition precedent to confirmation.

6. *In re Paul,* 13 Fed. Supp. 645, 647, District Court, Idaho, 1936. The court *refused to dismiss* a proceeding under subsection (s). *Obiter dicta* the court said it would seem that the Act did not intend that the farmer debtor should keep his land for ulterior purposes when he does not intend to or cannot rehabilitate himself.

7. *In re Buxton's Estate,* 14 Fed. Supp. 616, District Court, Illinois, 1936. The court erroneously held, in spite

of the specific provisions in Section 75 (r) that the administrator could not proceed under Section 75. This Court's opinion noted this case also as having held subsection (s) invalid and overruled it. This case is also discussed in this brief at page 14.

8. *In re Vater,* 14 Fed. Supp. 631, District Court, Kentucky, 1936. The proposal was for an extension of 15 years during which the debtor would pay taxes, keep the property in repair, and pay semi-annually as much as the income justified. The court said "This proposal obviously amounts to nothing more than an offer by the debtors to pay the creditors if and when they are financially able." The court could not confirm such an offer as subsection (i) prohibits it, but the court was not warranted in dismissing the entire proceedings. This case is discussed elsewhere in this brief at page 14.

9. *In re Schaeffer,* 14 Fed. Supp. 807, District Court of Maryland, 1936. The debtor had litigation pending in the State court involving the title to the security. The proposal stated that it was subject to a favorable decision in the State court and that "the only proposal he can make to his creditors is subject to the conditions above and that said proposal cannot be made absolute unless there has been a decision by the Circuit Court of Montgomery County." This offer could not be confirmed under subsection (i). This decision is discussed at page 14 of this brief.

10. *In re Duvall,* 14 Fed. Supp. 799, District Court, West Virginia, 1935. This case was another one based upon the old subsection (k) which has been repealed. The offer as made could not pass subsection (i). This case is discussed elsewhere in this brief at page 15.

11. *In re Byrd,* 15 Fed. Supp. 453, District Court of Maryland, 1936. *The debtor had abandoned his farm and moved*

to the city and the court held that he "may be said to be only colorably a farmer." This in itself required the petition to be dismissed.

12. *In re Wylie,* 16 Fed. Supp. 193, 194, District Court, South Carolina, 1936. The proposal was that "in the event he could make any profit out of his farming operations that same should be distributed equitably to his creditors." The court properly held it was not in good faith as it did not comply with subsection (i). This case has previously been discussed in this brief at page 15.

13. *In re Price,* 16 Fed. Supp. 836, 837, District Court, Louisiana, 1936. The court indicated that the debtor had never submitted any proposal whatever and a motion to dismiss would be entertained. It held however that a foreclosure sale conducted during the pendency of the proceedings was void and that the sheriff's deed should be cancelled.

14. *In re Chilton,* 16 Fed. Supp. 14, 17, District Court, Colorado, 1936. In holding subsection (s) to be constitutional the court merely remarked that "good faith is a condition precedent to the enjoyment of most, if not all, of the benefits of Section 75."

15. *In re Davis,* 16 Fed. Supp. 960, District Court, Texas, 1936. The case had progressed into subsection (s) and the statutory three year stay had been ordered. The proceedings were dismissed pursuant to paragraph (3) of subsection (s), and in doing so, the judge said that he made his holding *because of apprehension that the Supreme Court would hold the law unconstitutional unless there was an "equity" in the security.* This apprehension of the District Court was removed by this Court in *Wright* v. *Vinton,* 300 U. S. 440, where the secured debts were more than two times greater than the value of the security.

These are the fifteen cases which were cited by this Court *as ample evidence that the creditors had been substantially protected.* They were cited for no other purpose than to illustrate the practical administration of Section 75 under which the creditors had no right to complain. *This Court did not approve them.*

V

Some Opinions Illustrating the Legislative Purpose of Section 75.

A few opinions will here be quoted which discuss the procedure to be followed in the administration of Section 75.

In re Anderson, 23 Fed. Sup. 854, District Court, Illinois, 1938. Judge Wham who has been a Federal judge for many years and is often called to sit upon the bench of the Seventh Circuit of the Circuit Court of Appeals and who first pointed out the distinction in the famous "Five Rights" in *Louisville* v. *Radford,* 295 U. S. 555, which this Court observed in *Wright* v. *Vinton,* 300 U. S. 440, discussed the procedure to be followed in Section 75 and the purpose of the law as follows:

> "Petitioner insists that it is now apparent that there is no reasonable hope that debtor will be unable to rehabilitate himself financially within the three-year statutory period, that to continue the proceeding cannot reasonably be expected to have any effect beyond postponing inevitable liquidation, and, in view of these facts, that it is the duty of the court, now, under the terms of the Act (paragraph 3, subsection (s), section 75 of the Bankruptcy Act), when properly construed (Wright *v.* Mountain Trust Bank, 300 U. S. 440 at 461-462), to appoint a trustee and order the farm sold. Emphasis is laid on the fact, which is apparent, that the debtor has no equity in the land. It is urged that the evidence adequately shows that he cannot reasonably expect to raise enough money on the land, or otherwise, to pay

in full his debts, either secured or unsecured, during the three years allowed by the statute. This seems to be true.

The foregoing contention raises a nice point that may well be considered determinative here. Under paragraph 3 and under the decision of the Supreme Court in Wright *v.* Mountain Trust Bank, supra, if it appears from valid evidence at any time after adjudication that 'the debtor is beyond all reasonable hope of financial rehabilitation' (Wright *v.* Mountain Trust Bank, supra, Note 6, at page 461, 462) the court must halt the proceedings. In the language of the decision,

> "Paragraph 3 also provides that 'if * * * the debtor at any time * * * is unable to refinance himself within three years,' the court may close the proceedings by selling the property. This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period."

But, for the farmer debtor to rehabilitate himself financially or refinance himself within the meaning of the provisions of subsection (s) of section 75, is it necessary that he place himself in position to pay in full all his creditors, secured or unsecured, or both? Or, is it only necessary that the debtor shall be able, during the statutory period of the moratorium, to pay a fair rental upon the property which he retains under subsection (s), both real and personal, with the exception of his unencumbered exemptions, and within such period put himself in position to pay for said property at its appraised, or, if reappraised, at its reappraised value? A careful reading of subsection (s) of section 75 in the light of the entire section shows, I think, that the latter meaning was intended.

It must not be forgotten that we are dealing with a bankruptcy law that has for its purpose the salvaging of farmers who are insolvent and unable to pay

their debts in full. In bankruptcy it has never been supposed that the ordinary bankrupt would be able to pay any of his creditors in full, except those who held ample security. No more is it to be expected under subsection (s). In so far as the bankrupt farmer is unable to pay his debts in full he is entitled to a discharge therefrom (see paragraph 3) as in ordinary bankruptcy even though he succeeds in refinancing himself under the terms of the subsection (s). Under subsection (s) the only essential requirements of the farmer, aside from complying with procedural conditions, are that he shall act in good faith and that he shall, during the period of the moratorium, pay into court the reasonable and customary rental value of the property retained by him and at the end of three years, or prior thereto, pay into court the appraised or reappraised value of the property which he retains, with due allowance at all times for his lawful unencumbered exemptions.

It is true that the court, in its discretion, under the provisions of paragraph 2 of subsection (s), for the protection of creditors, may require the farmer to pay into court for the benefit of creditors definite sums, fixed by the court, in addition to rentals. But such requirement must not be inconsistent with 'debtor's ability to pay, with a view to his financial rehabilitation.' His failure to comply with such reasonable order of court could justify the appointment of a trustee and the sale of the property under paragraph 3 as being a failure to comply with an order of court, but not on the theory that he is unable to refinance himself. This situation is not presented here.

It is also true that Congress, to insure the constitutionality of the law, has provided therein that a secured creditor, if not satisfied to accept the appraised or reappraised value of his security, may have a public sale of the property upon which he has his lien and buy it in at the sale, subject to the farmer's right of redemption, within ninety days, even though the farmer has succeeded in raising enough money to pay into court for the benefit of such secured creditor the appraised

or reappraised value of the encumbered property. Pursuing this undoubted right, the secured creditor may deprive the farmer of the intended ultimate benefit of the provisions of the Act which is the saving of his farm. Yet I think it was in the mind of Congress that the ordinary secured creditor would usually be willing to accept, in lieu of his security, its fair cash value as established by a fair appraisal; that the farmer to refinance himself within the meaning of the Act should be compelled to refinance not his full indebtedness but only the appraised value of the encumbered property as well as the unencumbered property retained by him; that he should not be compelled, in any case, to refinance the entire secured indebtedness, if such indebtedness exceeds the value of its security except to the extent that he might have other property or assets available for that purpose. Otherwise, judging from observation and experience, section 75, subsection (s), intended to meet a great financial crisis among the farmers, can be helpful in comparatively few cases.

It is generally known that, after the slump in farm values, large numbers of farmers with supposedly substantial equities in their mortgaged farms awoke to find their farms mortgaged far beyond their value though there had been an ample margin of safety when the encumbrances were placed thereon. Subsections (a) to (r) of section 75 were enacted to relieve against such situations, and, if possible, to enable the honest but financially embarrased farmer and his creditors to adapt themselves by agreement, under the supervision of the court, to the actual conditions caused by the radically lowered values so that the farmer might save his farm and necessary equipment and at the same time the secured creditors be protected to the full value of their security and the debtor's ability to pay and the unsecured creditors to the full value of all unencumbered property over and above the debtor's exemptions. Subsection (s) was enacted with a view to the accomplishment of approximately the same result through a bankruptcy proceeding in cases in which the farmer, acting in good faith, found it impossible to reach a fair settle-

ment with his creditors by way of composition or extension under subsections (a) to (r).

If I am correct in my interpretation of the Act, then to justify an order of the court terminating the stay, appointing a trustee and directing a sale of the property on the ground that the farmer cannot refinance himself, it must appear from the record and from the evidence that there is no reasonable hope that debtor will be able within the period of the three year moratorium to pay in semi-annual payments a reasonable and customary rental for the unexempt property retained by him and at or prior to the end of such period to pay into court for the benefit of his creditors the appraised or reappraised value of the property retained by him. That he may not be able within such period to pay his debts in full is immaterial.

The evidence here fails to convince me that there is no reasonable hope that the farmer will be unable to finance himself within the meaning of that term as hereinabove stated. If he can, he will have complied with the Act on his part. If the secured creditor then chooses to demand a public sale, the court must order it. Nevertheless, even though, as a result of such sale, the farmer fails to save his farm he will have done all that the Act contemplates he should do to rehabilitate himself. The secured creditor has no right to insist that he do more in order to be entitled to the full period of the statutory stay."

Judge Schoonmaker of the District Court of Pennsylvania in the matter of *Reaney*, 25 Fed. Supp. 71, 1938, said:

"The testimony offered by Anna Aiken Leach sought to show that the debtor could not in three years pay off the indebtedness in full out of his assets, and that the fair rental value of the farm of the debtor was $500.00. On the other hand, the testimony of debtor tended to show that he could raise the appraised value of the property, and that his offer of compromise of approximately $8,000 was more than the appraised

value of his real and personal property, and that he could pay rental of $500.00 per year for the premises. In support of his ability to finance his offer of composition, he presented the affidavit of a person who had agreed to loan him $8,000 to carry out his composition offer.

The whole question for consideration, as we view this case, is whether or not the debtor is proceeding in good faith, and has some reasonable opportunity of rehabilitating himself. There was testimony offered tending to show that the debtor was negligent in his method of operating the farm, that he spent considerable time in taverns rather than in farming. On the other hand, this was distinctly denied by the debtor. As we view it, the offer of debtor to pay his creditors more than the fair market value of all of his property, is an evidence of good faith; and for that reason we ought to accord to him the benefits provided for by the Bankruptcy Act. The fact that the debtor seeks to retain control of his property and yet turn over to his creditors a fair and reasonable value of the property would seem to be evidence of good faith.

We, therefore, shall decline to dismiss the petition as brought in bad faith, and shall accord to the debtor a stay for a three-year period under the provisions of subsection (s) of section 75 of the Bankruptcy Act. The rental we fix at $500.00 per year to be paid in quarterly installments of $125.00; the first installment to be paid in three months from the date of the order; and the remaining installments to be paid quarterly thereafter."

Judge Atwell of the District Court of Texas said in *In re Bumpass*, 23 Fed. Supp. 876, 1938:

"Subsection (2) under subsection (s), 11 U. S. C. A., Section 203, (s) (2), provides that:

'When the conditions set forth in this section have been complied with, the court shall stay all judicial proceedings, in any court for a period of three years. During such three years, the debtor shall be permitted

to retain possession of a.. or any part of his property, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession.'

There are provisions as to the payments.

Subsection (3) of subsection (s), 11 U. S. C. A., Section 203 (s) (3) provides that:

'At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession [I might interpolate right here, that a high appraisal is against the interest of the debtor, ordinarily, because that is the amount that the debtor must pay at the expiration of three years], including the amount of encumbrances on his exemptions up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor.'

We cannot read this subsection in any way except as a procedure for the debtor. I think it also might be said it likewise protects the creditors, as intended by this particular statute-writer, and so far the courts have sustained it as now written.

The proviso that, 'upon request in writing by any secured creditor or creditors, the court shall order the property upon which (they) have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold * * * by paying the amount for which (it) was sold, together with 5 per centum per annum interest,' follows.

Then comes this provision:

'If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act [title].'

Three years is what Congress meant the debtor should have, and the court should see that the debtor does not fritter away property on which the creditors have a lien. It will keep its fingers upon the income and arrange for a proper rental. Out of the rental must come the taxes, of course.

This court, has, in cases where there was a manifest inability to farm the lands properly without any apparent ability to pay the rental and where the impossibility of rehabilitation was apparent, held it was inequitable to hold off the creditors the statutory time of three years.

But this bankrupt has a right to have his three years so long as the court finds, as it does, that he has paid his rentals, as well as more on his debts than he was bounden to pay, and his security is in good condition and he has been looking after and farming it in splendid fashion."

In *Noble* v. *Hopwell*, 98 F. (2d) 623, 1938, Circuit Judge Biggs of the Circuit Court of Appeals for the Third Circuit said:

"In our opinion the decision of whether or not an individual is a farmer must turn upon consideration of all of the circumstances. The fact that the appellants' income from farming was almost negligible due to ill health and ill luck is beside the point, and we do not consider the fact that the appellants hoped to rehabilitate themselves by the sale of the farm to some one who would use it as a country estate renders the appellants any less entitled to the benefits of the Act. To lay much emphasis upon their future hopes is to give a false picture of the situation. If the appellants were farmers

in fact, they did not cease to be such because they entertained hope of escape from that existence by the sale of their property to someone who would put their land to much the same use."

In the Matter of *Gorman*, 37 ABR NS 740, 1938, Judge McVicar of the District Court of Pennsylvania said:

"The question for decision now is, under the facts as aforestated, whether the original petition of the farmer should be dismissed or whether he should be allowed to amend the same under section 75 (s). Section 75 (e) provides that the conciliation commissioner shall call a meeting of creditors, stating in the notice that the farmer proposes to offer terms of composition or extension. The conciliation commissioner shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made. Paragraph (g) of the same section provides that an application for the confirmation of an extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected. General Order or Rule 7 of the Supreme Court provides that the judge shall fix a date and place for a hearing before him upon the application for confirmation. Paragraph (s) of section 75 provides that any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition or extension proposal may amend his petition by asking to be adjudged a bankrupt.

These sections control the disposition of the question now before us. The farmer presented his original petition under Section 75. He made an offer of extension which was not accepted by his creditors. He then asked to be adjudged a bankrupt under paragraph (s) of said section.

Paragraph (i) of Section 75 provides that the court shall confirm the proposal, provided that it is satisfied

that certain facts exist, but it has no application to a case where there was not an acceptance of the proposal. As a matter of fact, the court did not have any hearing under this paragraph because there was no occasion therefor."

In *Gray* v. *Union*, etc., 105 F. (2d) 275, 1939, Judge Hamilton in the opinion of the Circuit Court of Appeals for the Sixth Circuit said at page 277:

"Section 75 was intended to enable insolvent farm debtors or those unable to meet their obligations as they matured *to retain control of their property on turning over to their creditors its fair and reasonable market value in either money or its equivalent.*

In order that this might be done without liquidating the estate at the depth of a nation-wide depression and sacrificing intangible values inherent in the operation of a farm as a going concern and to serve a broader economic purpose, a qualified extension of time was provided for the farmer to pay his debts. Broadly stated, before a farmer is entitled to an extension under the Act, the following must appear, (1) the debtor must have made a proposal to his creditors which includes (a) an equitable and feasible method of liquidation of the claims of the secured creditors and his own financial rehabilitation, (b) his proposal must be for the best interests of himself and creditors, (c) the proposal must be in good faith. (2) *If the farmer fails to obtain acceptance of his good faith proposal by a majority in number and amount of all claims affected, he may have an extension under Section 75 (s) as amended* (11 U. S. C. A., Section 203 (s), *In re Coleman*, D. C., 21 F. Supp. 923, affirmed in 6 Cir., 93 F. 2, 1001.

The law should be construed and applied as to accomplish its purpose with due regard to the constitutional protection of creditors.

The purpose of the Act is not to deprive creditors of their security and give it to debtors but to confer judicial discretion in each case where the facts justify giv-

ing the debtor an equitable opportunity to liquidate his indebtedness in an orderly way, provided this may be done without an essential impairment of the rights of the secured creditor.

The good faith spirit of the Act contemplates that before the debtor is entitled to an extension, he must offer a fair and reasonable method of liquidating his secured indebtedness over the period of extension, which will leave no uncertainties.

The plan should provide for payments, equal to the fair value of the property at the date of adjudication, plus carrying and interest charges, minus the value of exempt property, to creditors in the order of their priority during, or at the end of, the period of extension. Ordinarily, bankruptcy offers of composition contemplate a distribution to the creditors based on the present value of the bankrupt's assets and usually creditors are satisfied if they receive on liquidation a sum equivalent to that.

The lien debts are worth no more than the value of the property and any deficiency would be a dischargeable debt. It therefore follows that the lien creditor loses nothing so long as his debt is made secure to the extent of the value of the property. At the end of the extension period, under the provisions of the Act, the creditor may, if he so elects, require that his lien be discharged by a judicial sale in which event he would obtain the benefit of any increase in the value of the lien property due to improved economic conditions. *The good faith of the debtor does not contemplate that he shall offer to pay the entire secured debt within the period of extension nor does it follow that because presently the debt delinquencies of the farmer exceed the fair market value of his assets, that he is deprived of the benefits of the Act, but it must appear from the debtor's offer of composition or extension, that there is a reasonable probability, within the proposed extension period, of either refinancing or liquidating his secured indebtedness, to the extent of the value of his assets in lien, or refinancing or paying to his unsecured*

creditors the value of the property not in lien; otherwise, his offer lacks the inherent and essential elements of good faith: *In re Anderson,* D. C., 22 F. Supp. 929."

In denying a creditor's motion to dismiss proceedings under Section 75 (s), Judge Cooper's observations are reported in paragraph 51848 of the Bankruptcy Law Service of the Commerce Clearing House, in the Matter of *McCracken* as follows:

"The plan contained potential salvation for the debtors. In the year preceding their petition they received $2,200 in milk checks. Under the terms of the chattel mortgage, almost this entire sum was paid toward its reduction. The plan submitted by the Conciliation Commissioner abrogated this condition. The interest on the bank's mortgage at 4% totaled $120. Taxes, insurance and other carrying charges amounted to about $100. Upkeep of the property reached $80. The $140 remaining was applicable to secured and unsecured debts. The creditor holding the chattel mortgage received from this $140 carrying charges on the balance and a small amount on the principal to compensate for depreciation of the live stock. In his opinion the court stated:

'Even if other creditors receive little or nothing during the three year period [the debtors are] entitled under the present circumstances, while the present economic situation continues, to have a chance to rehabilitate [themselves.]' "

The report of the case of *In re Knapp,* in paragraph 51851 of the Bankruptcy Law Service of the Commerce Clearing House in 1939, before Judge Cooper of the District Court of New York, reads:

"This was a motion by the land contract vendor to dismiss the proceeding on the ground that the petition was not filed in good faith and that the debtor's finan-

cial rehabilitation could not be accomplished under the proceedings.

The debtor in 1920 contracted to buy the farm for $7,500. The total cash paid on the purchase following 1931 was $400. The contract vendor paid the taxes on the farm nearly every year; in 1936 he paid $22.00 insurance and he advanced $1,131.14 for living expenses and farm operations. The accumulated interest on the land contract amounted to $2,390. Approximately $6,246 was due the vendor when the debtor filed his petition.

The bankrupt's non-exempt property was appraised $2,500 (the assessed valuation of the farm accounted for $1,800 of this total). The debtor's principal income was derived from the dairy business; he and his wife owned 16 cows.

The conciliator fixed $300.00 per year as the sum for the debtor to pay under the three year provision of Section 75 (s).

The court expressed grave doubt as to the debtor's ability to rehabilitate himself; however, under certain modifications of the conciliation commissioner's plan, the court decreed that the debtor be given an opportunity under the Act. The court said:

'The motion is denied if the debtor shall be required to pay to the contract vendor, interest at 5% on the $2,500 appraisal value, either out of the $300 rental or otherwise and to pay the contract vendor $50.00 to be paid on January 6th, 1940 and annually thereafter during the three years, beyond the rental, to apply on the principal of the debt payable.'"

In the early uncertain days of the adjudication of Section 75 when the members of both the bench and of the bar were developing a form of procedure for the new legislation, Judge Dewey of the District Court of Iowa, in the Matter of *Wilkin*, 8 Fed. Supp. 222 said:

"Prior to the creditors' meeting the debtor filed a proposal for composition and extension, and the creditors present stated that they would refuse the offer

and demanded that the case be dismissed. This was overruled by the commissioner, and he was clearly right. The purpose of the Act is to endeavor to obtain a composition or settlement between debtor and creditor, if possible, and this may not be accomplished at the first meeting. The commissioner should, if reasonable request is made by either the debtor or the creditors, continue the first meeting and permit the parties to endeavor to work out a conciliation agreement, if possible. This procedure can only be continued for a reasonable time.

Rule L, subd. 4, of the amendment to the General Orders in Bankruptcy, promulgated by the Supreme Court on April 17, 1933 (11 U. S. C. A. Section 53), with reference to proceedings under Section 75 of the Act, is somewhat analogous, although it refers only to a confirmation. It provides:

'4. If the farmer has not applied for confirmation within such reasonable time as has been finally fixed therefor, which shall be not later than three months after the date of the first meeting the conciliation commissioner shall, unless the judge for cause shown shall have permitted a further extension, forthwith report the facts to the judge, who shall thereupon dismiss the proceedings.'

The above objections having been overruled at said meeting, the debtor file an amendment to this petition asking for the appraisal of his property under the provisions of section 75 (s) of the Act, 11 U. S. C. A., Section 203 (s). Thereupon the commissioner called for designations of appraisers as provided by the rules of this court. The creditors objected to the designation and appointment of appraisers, urging that the conditions precedent to the operations of subdivision (s) of section 75 of the Act had not been complied with. This objection was also overruled, and the debtor and some of the creditors designated appraisers.

This presents for ruling the most important question with reference to procedure under subdivision (s)

of section 75 of the Act [11 U. S. C. A., Section 203 (s)]. Judges of federal courts and referees have given considerable time and study to the question. It was my first conclusion, and the supplemental rules promulgated by this court on July 7, 1934, indicate that the first sentence of the Frazier-Lemke Act [section 75 (s)] gave to a debtor a discretion and that he might still have the benefits, if any, of subdivision (s), although not electing to file a petition asking to be adjudged a bankrupt. There are reasons why this should be the interpretation, if possible. The intention of the framers of section 75 of the Act evidenced a desire to keep down the expenses and the necessity for immediate relief, if possible, is apparent. In so deciding, however, I was required to disregard the first sentence of subdivision (s), and I am now convinced that this cannot be done; but this sentence must be read in connection with the other provisions of the Act. In thus reading it I am now firmly of the opinion that proceedings under section 75 (s) of the Act cannot be maintained except and until an adjudication in bankruptcy. Even without this ruling this court had long been of the opinion that none of the provisions of section 75 (s) of the Act could be available to a debtor until all the provisions of the Act with reference to composition and extension (section 75 (a-r), 11 U. S. C. A., Section 203 (a-r) had been exhausted and that such exhaustion of those remedies must be a condition precedent to the appointment of appraisers under subdivision (s)."

CONCLUSION.

The conclusion of the whole matter in this case, which is typical of thousands of others now pending, would seem to be that a due regard for the powers of the Congress as expressed in Section 75 of the Bankruptcy Act requires that the procedure be followed as laid out in the Act. Any attempt to tone down its provisions in consideration of the objections of creditors, secured or unsecured, by deviation from the law as written is of the nature of a trespass upon

the legislative powers of the Federal government delegated exclusively to its legislative department by the Constitution.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 33.—October Term, 1939.

John Hancock Mutual Life Insurance Company, Petitioner, vs. Benno Bartels.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 4, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In this proceeding brought by a farmer under Section 75 of the Bankruptcy Act, the District Court dismissed the debtor's petition. The Circuit Court of Appeals held that this action was contrary to the requirements of the statute and directed the proceeding to be reinstated. 100 F. (2d) 813. Because of conflict in the rulings of the Court of Appeals of the Fifth Circuit, due to the differing views of the judges composing the court in the cases cited,[1] and because of the importance of the question, we granted certiorari. April 24, 1939.

Respondent Bartels presented his petition to the District Court on December 2, 1937, asking that he be afforded an opportunity to effect a composition or extension of time to pay his debts under Section 75. The court referred the matter to a conciliation commissioner, directing the debtor to appear before the commissioner and to submit to such orders as might be made in proceedings under that section. A meeting of the creditors was held on December 21, 1937, at which the debtor was present and was examined. It appeared that his debts amounted to about $10,000 of which about $8,000 (including interest and attorney's fees) was owing to the John Hancock Mutual Life Insurance Company and was secured by a lien upon his home. As the debtor was unable to obtain an agreement with a majority of his creditors in number and amount, he notified the commissioner that he would apply to be adjudged a bankrupt under subsection (s) of Section 75. That application was filed on January 10, 1938. The debtor asked that "his prop-

[1] See Baxter v. Savings Bank of Utica, 92 F. (2d) 404; In re Henderson, 100 F. (2d) 820; Wilson v. Alliance Life Insurance Co., 102 F. (2d) 365.

erty be appraised", that "his exemption be set aside to him" and that he be permitted "to retain possession of his property under the supervision of the court". On the same day, the District Judge entered an order adjudging the debtor a bankrupt and requiring further proceedings before the commissioner acting as referee under subsection (s).

On March 23, 1938, the John Hancock Company moved to set aside the adjudication and to dismiss the debtor's petition on the ground that the debtor was not entitled to avail himself of the provisions of subsection (s); that he had not presented any feasible plan for a composition and extension of his debts, and that his petition "was not filed in good faith" or "with any hope or expectation of working out his debts and paying up his delinquencies but apparently for the sole purpose of hindering and delaying his creditors". The Company also alleged that at the fair market value of the real property held by it as security there was no equity for the debtor and that the Company would suffer irreparable loss unless the adjudication was set aside and the proceeding dismissed. The debtor denied these allegations and alleged that the land on which the Company had a lien was worth unimproved more than $7,000 and that the improvements were worth $6,000 and that he thus had a large equity which would be lost to him unless he obtained the benefits sought under the applicable law.

At the hearing of the motion on April 5, 1938, the court received the evidence previously taken before the commissioner and additional testimony. Thereupon the motion was granted. The District Judge said in his opinion that the debtor had not made any proposal which could be construed as a "good faith offer for an extension or composition" and hence the debtor was not entitled to be adjudged a bankrupt under subsection (s). The District Judge observed that the evidence was conflicting as to the value of the land (100 acres); that, separating the land from its improvements, certain of the debtor's witnesses placed its value at $70 an acre and the improvements at $5,000 or $6,000, while witnesses for the creditor valued the land at about $40 an acre and the improvements at about $2,000. He thought that there was no reasonable probability of the property being sold for enough to give any substantial equity to the debtor and accordingly found that there was no reasonable probability of the debtor's fi-

nancial rehabilitation. In that view the District Judge concluded "that the order adjudicating the debtor a bankrupt under subsection (s) was improperly entered and should be set aside and the cause dismissed".

We think that the District Judge failed to follow the mandate of the statute and that the Circuit Court of Appeals was right in reversing the judgment and ordering the proceeding to be reinstated.

Subsection (s) of Section 75 as amended by the Act of August 28, 1935,[2] prescribes a definite course of procedure. That subsection applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amonnt of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts. That was Bartels' situation. Provisions for proceedings by a farmer to obtain a composition or extension, when he is insolvent or unable to pay his debts as they mature, are found in subsections (a) to (r) of Section 75. For that relief Bartels had presented his petition under subsection (c) and the District Court had approved the petition as properly filed. According to the report of the conciliation commissioner, to whom the matter was referred according to the statute, Bartels had appeared at the meeting of the creditors and had submitted to a detailed examination concerning his financial condition. He proposed to sell certain property and to apply the proceeds to the payment in part of the amounts due to the John Hancock Company, the secured creditor. He succeeded in obtaining an agreement with certain unsecured creditors for an extension but the secured creditor refused consent, as Bartels could not meet all his arrears. Bartels was thus precisely in the condition prescribed in subsection (s).

The subsections of Section 75 which regulate the procedure in relation to the effort of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor.[3] Nor is there anything in these subsections which warrants the imputation of lack of good faith to a farmer-debtor be-

[2] 49 Stat. 943; Wright v. Vinton Branch, 300 U. S. 440.

[3] What is said upon this point in Note 6 in Wright v. Vinton Branch, 300 U. S. 440, 462, was not essential to the opinion in that case and is not supported by the terms of the statute.

cause of that plight. The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to ask for the other relief afforded by subsection (s). The farmer-debtor may offer to pay what he can, as Bartels did, and he is not to be charged with bad faith in taking the course for which the statute expressly provides. The only reference in Section 75 to good faith is found in subsection (i), which relates solely to the confirmation of proposals for composition or extension when the court must be satisfied that the offer and its acceptance are in good faith and have not been made or procured by forbidden means or except as provided in the statute. That provision manifestly hits at secret advantages to favored creditors or other improper or fraudulent conduct.

As Bartels' case thus fell within subsection (s), he amended his petition and asked to be adjudicated a bankrupt as that subsection permits. He was so adjudicated. Bartels then asked, also as provided in subsection (s), that his property be appraised, that his exemptions be set aside to him as provided by state law, and that he be allowed to retain possession of his property under the supervision of the court, that is, subject to such orders as the court might make in accordance with the statute. The court failed to take that action. Instead of having the property appraised, the court received conflicting testimony as to value, discussed the chances of the debtor's rehabilitation and dismissed the petition and all proceedings thereunder.

The procedure under subsection (s) is intended to protect all interests. It provides, in paragraph (1), that after the value of the debtor's property has been fixed by the prescribed appraisal, the referee shall set aside the debtor's unencumbered exemptions and direct his retention of possession of the rest of his property subject to all liens and to the court's supervision and control. Under paragraph (2), if there has been compliance with the statutory conditions, the court is directed to stay all proceedings against the debtor or his property for a period of three years, and during that time the debtor may retain possession of all or part of his property subject to the court's control, provided he pays a reasonable rental semi-annually. That rental is to be paid into court and is to be

used first for the payment of taxes and the upkeep of the property and the remainder is to be distributed among the creditors as their interests may appear. If the court finds it necessary to protect the creditors "from loss by the estate", or "to conserve the security", the court may order any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, to be sold at public or private sale, and the court, in addition to the prescribed rental, may require payments to be made by the debtor on the principal of his debts in the manner set forth. Then it is provided, in paragraph (3), that at the end of the three-year period, or at any time before that, the debtor may pay into court the appraised value of the property of which he retains possession, "including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal", for appropriate distribution to his creditors. There is the proviso that upon the request of any creditor, or of the debtor, the court shall cause the debtor's property to be reappraised, or in its discretion set a date for hearing, and thereafter fix the value of the property in accordance with the evidence, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to his creditors. In that way, by the order of the court, the debtor may regain full possession and title of such property, the ascertained value of which has thus been devoted to the payment of his debts. There is the further proviso, for the protection of secured creditors, that upon request in writing by any secured creditor the court shall order the property upon which the secured creditor has a lien to be sold at public auction. See *Wright* v. *Vinton Branch*, *supra*, pp. 458-461. The debtor is to have ninety days to redeem the property so sold by paying the amount for which it was sold, with interest, into court, and he may apply for his discharge as provided in the Act. If, however, the debtor at any time fails to comply with the provisions of the section or with any orders of the court made thereunder, or is unable to refinance himself within three years, the court may order the appointment of a trustee and direct the property to be sold or otherwise disposed of as provided in the Act.

The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the

debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved. See *Wright* v. *Vinton Branch, supra; Adair* v. *Bank of America Association,* 303 U. S. 350, 354-357; *Wright* v. *Union Central Life Insurance Co.,* 304 U. S. 502, 516, 517.

We are not here concerned with questions which may arise in the course of the administration under the statute, but merely with the duty to follow the procedure which the statute defines and the District Court failed to observe. We hold that on his amended petition invoking subsection (s) Bartels was entitled to be adjudged a bankrupt and to have his proceeding for relief entertained and his property dealt with in accordance with that subsection.

The judgment of the Circuit Court of Appeals reversing that of the District Court and directing the proceeding to be reinstated is affirmed and the cause is remanded to the District Court with direction to proceed in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.